TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 186

THE PEOPLE OF SIOUX COUNTY, NEBRASKA, PETITIONER,

vs.

NATIONAL SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED [illegible]

CERTIORARI GRANTED [illegible]

(28,440)

(32,548)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 18, 1927

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[fol. 1]

IN DISTRICT COURT OF SIOUX COUNTY, NEBRASKA

EDWIN B. LYON, as Treasurer of the County of Sioux, Plaintiff,

vs.

NATIONAL SURETY COMPANY, Defendant

PETITION

Comes now the plaintiff Edwin B. Lyon, as treasurer of the county of Sioux in the state of Nebraska, by M. J. O'Connell, Esq., and Messrs. E. D. & F. A. Crites, his attorneys, and complaining of the defendant National Surety Company avers and respectfully shows to the court:

1. The County of Sioux on all of the dates hereinafter alleged was, ever since has been, and now is, a body politic and corporate, duly authorized, organized and existing as one of the counties of the state of Nebraska under the constitution and laws of the state of Nebraska.

2. This plaintiff now is and on all of the dates hereinafter alleged was the duly elected, qualified and acting [fol. 2] County Treasurer of said county of Sioux, for the term of four years commencing on the 4th day of January, A. D. 1923 and that this plaintiff is now in the possession of said office and in the exercise of the powers, rights, duties and franchises thereof.

3. That the defendant, National Surety Company, on all of the dates hereinafter alleged was, and now is, a corporation duly authorized, organized and existing as such under and by virtue of the laws of the state of New York, doing a general surety business with its principal office and place of business in the city of New York, in the state of New York, under the corporate name and style aforesaid, and that said National Surety Company on said dates was duly admitted, licensed and let in to do and in the actual transac-

tion of a general surety business in the county of Sioux, in the state of Nebraska.

4. That on all of said dates the First National Bank of Harrison was, and now is, a national banking corporation duly authorized, organized and existing as such under the national banking laws of the United States with its principal office and place of business at Harrison in Sioux county, Nebraska, and until becoming insolvent, as hereinafter alleged, transacted a national banking business at Harrison, in the county of Sioux, under the corporate name and style aforesaid.

5. That under and by virtue of the provisions of law in that behalf it is the duty of this plaintiff to deposit and at all times keep on deposit for safe keeping in state, national or private banks doing business in the county of Sioux, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such County Treasurer, and that pursuant to the provisions of law in that behalf the said, The First National Bank of Harrison, on the 26th day of December A. D. 1922, then being located in said county of Sioux, did apply in writing, to the Honorable The Board of County Commissioners of Sioux county, Nebraska for the privilege of keeping such moneys upon deposit in said bank upon the following conditions: All such deposits to be subject to payment when demanded by the County Treasurer on his check, and interest to be paid thereon amounting to 2% per annum upon the amount so deposited as provided by law and subject also to such regulations as are imposed by law, and for the security of the funds so deposited under the provisions of law this plaintiff did require the said, The First National Bank of Harrison as such depositary to give bond for the safe keep-
[fol. 3] ing and payment of such deposits and the accretions thereof, running to the People of the County to be approved by the County Board and conditioned that such depositary should, at the end of each and every month, render to the Treasurer and County Board a statement, in duplicate, showing the several daily balances and the amounts of moneys of the county held by it during the month, and the amount of the accretion thereof, and how credited, and for the payment of the deposits and the accretions accrued thereon as provided by law, and for the payment of the

deposits and the accretions thereon when demanded by the County Treasurer on his check at any time and generally to do and perform whatever might be required by the provisions of law and the faithful discharge of the trust reposed in such depositary.

6. That thereupon the said defendant, The National Surety Company, by its duly authorized agent and attorney in fact in consideration of a certain reward to it paid by the said, The First National Bank of Harrison, and in further consideration of the deposits of money to be made by this plaintiff in the said depositary bank, The First National Bank of Harrison in reliance upon such bond did, with the said First National Bank of Harrison as principal, duly make, execute and deliver to the plaintiff its depositary bond or obligation in writing running to The People of the County of Sioux, in the state of Nebraska, as obligee, conditioned as required by law, and as above recited and set forth, of which the following is a true and correct copy to-wit:

National Surety Company

County Depositary Bond

(Nebraska)

Know all men by these presents:

That we, First National Bank of Harrison, Nebraska as Principal, and the National Surety Co. of New York, N. Y., as Surety are held and firmly bound unto the people of the County of Sioux in the State of Nebraska, in the just and full sum of Thirty Thousand and no/100 Dollars ($30,000.00), for the payment of which, well and truly to be made, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents, Dated this 12th day of December A. D. 1922.

[fol. 4]

Whereas, the said Bank in consideration of the deposits of certain of the moneys of Sioux County — for safe keeping with and in First National Bank, Harrison, Nebraska the amount whereof shall be subject to withdrawal or diminution by said

County Treasurer, as the requirements of said County Shall demand, and which amount may be increased or decreased as the said Treasurer may determine; and, Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay and will pay to Sioux County the sum of not less than two per cent (2%) per annum on account of said deposit, the same shall be paid quarterly upon the daily average of the sum of such amount as the said Bank shall have on deposit, for the quarter or any fraction thereof next preceding the payment of said percentum, which shall be computed and credited to the account of Sioux County And shall become a part thereof. Now Therefore, if the said First National Bank of Harrison, Nebraska shall at the end of every month render to the Treasurer of said Sioux County and County Board a statement in Duplicate showing the daily balance of the Sioux County moneys held by it during the month next preceding, and the accretions thereof, and has the same has been credited, and shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of County Treasurer, as aforesaid, and shall pay over the same and each and every part thereof, upon the written demand of the County Treasurer, and shall estimate, calculate and

[fol. 5] pay said percentum as aforesaid, and to his successor in office as shall be by him demanded, and shall in all respects, save and Keep the County of Sioux and the said County Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void; otherwise to be and remain in full force and virtue. This bond to be and remain in full force for a period of Four Years beginning on the

31 4th day of January 1923, and ending on the 6th day of
32 January 1927.
33 In Testimony Whereof, the said First National Bank
34 of Harrison, Nebraska the Principal,
35 herein named, has caused this instrument to be signed in its name and behalf by its President or Vice-President, attested by
36 its Cashier, and its Corporate Seal to be hereto affixed and the said National Surety Co., of New York, N. Y. the
37 Surety herein named, has caused this instrument to be signed in its name and behalf by its Attorney-in-Fact
38 and attested by its common and corporate seal hereto affixed the day and year above written.

First National Bank, Harrison, by W. H. Davis, Vice-President. Attested: Theo Okerblade, Cashier. (Corporate Seal First National Bank of Harrison, Harrison, Nebr.) National Surety Company, New York, Incorporated 1897.

[fol. 6] STATE OF NEBRASKA,
Sioux County, ss:

Filed in the office of County Clerk this 26th day of Dec. 1922.

A. C. Davis, County Clerk.

Book C of Bonds, page 277.
Approved as to form and sufficiency & ordered filed.
W. B. Woodruff, Chairman Board Co. Commrs.
Henry Thomas.

7. And that thereupon the said bond was duly filed with the County Board of Commissioners of said county, together with the said application for approval.

8. Thereupon to-wit: On the 26th day of December A. D. 1922 the Honorable Board of the County Commissioners of said county of Sioux did duly act upon the application of the said, The First National Bank of Harrison, and did accept and approve the said application and did select said First National Bank of Harrison as such depositary and did accept and approve the said depositary bond so filed in behalf of said depositary bank and did give notice of

such acceptance and approval to the said defendant, the National Surety Company, and thereupon the said, The First National Bank of Harrison became, was, and so remained, until the insolvency of said bank, a depositary bank of county funds under the provisions of law in that behalf and that this plaintiff, as such County Treasurer, pursuant to law retained on deposit, and from time to time did deposit, and at all times did keep on deposit for safe keeping therein moneys in his hands collected and held by him as such County Treasurer in reliance upon the said bond above copied and set forth with the knowledge of the said defendant National Surety Company.

9. That the said depositary bond covered one term only of this plaintiff as County Treasurer to wit: The official term commencing on the 4th day of January A. D. 1923.

10. On the 4th day of February A. D. 1924 this plaintiff, as such County Treasurer, had and kept on deposit for safe keeping in said depositary bank to-wit: The said The First National Bank of Harrison, under and in reliance upon the said bond moneys in his hands so collected and held by him as such County Treasurer to and in the amount of $35,395.70, and that the same was so deposited and then [fol. 7] remained so on deposit in said depositary bank in an open account as a general deposit subject to the check or draft of this plaintiff as such County Treasurer and subject to disposition as provided by law and the condition of said bond, and that on said date the said, The First National Bank of Harrison, became and was insolvent and because of such insolvency ceased to do business as such, and closed its doors and refused to pay checks and drafts lawfully drawn thereon by this plaintiff, and its depositors, and the Comptroller of the Currency becoming satisfied of the insolvency thereof, after a due examination of its affiairs, having found the same to be insolvent, with the approval and consent of the Secretary of the Treasury of the United States, pursuant to the authority vested in him by law on the 12th day of February A. D. 1924 did appoint one Ralph S. Pryce, as receiver of the said insolvent bank. The First National Bank of Harrison, and that on the said 12th day of February A. D. 1924, the said Ralph S. Pryce, having duly qualified as such receiver, took possession of the said bank and all of the moneys, deposits, and

assets thereof including the deposit of this plaintiff therein for the purpose of closing the affairs of the said bank, and for the other purposes provided by law and ever since has been, and is now, the receiver of the said, The First National Bank of Harrison, and in possession of all of its moneys, deposits, properties and assets, and that the deposit above alleged and referred to and herein involved then had and held by this plaintiff in the said depositary bank was a deposit covered by the depositary bond above alleged, copied and set forth.

11. That by reason of said insolvency and the appointment of such receiver the said The First National Bank of Harrison incapacitated itself to make payment and delivery of the said moneys of this plaintiff as such County Treasurer so on deposit with it under said bond, but nevertheless this plaintiff has, from time to time, duly demanded payment of said deposit in said sum of $35,395.70 from the said bank and from its said receiver and has likewise, from time to time, prior to the institution of this suit, demanded the interest accruing under said deposit and secured by said bond, but payment thereof has been refused by the said bank and its said receiver for want of funds wherewith to pay and discharge the same and the same has been wholly converted to the use of the said, The First National Bank of Harrison, and no accounting has been made therefor to this plaintiff either by said bank or its said receiver.

12. The said bank paid interest under the terms of said deposit on the said deposit up to the first day of January [fol. 8] A. D. 1924, and that there is due under and unpaid from the said bank upon said deposit, interest at 2% per annum from that date on account of said deposit payable quarterly upon the daily average of the sum of such amount as the said bank had on deposit for the quarter or any fraction thereof next preceding the payment of said percentum, and that the amount of said interest so accruing upon daily balances from the first day of January A. D. 1924 to the date of the insolvency of said bank and the demand by this plaintiff of payment of his deposit and the refusal of the said bank to-wit: The 4th day of February 1924 in the sum of $ .... which should be tacked to the

principal sum, together with interest on the total at 7% per annum from the said 4th day of February A. D. 1924.

13. Plaintiff brings this action in his official capacity as treasurer of said County of Sioux for the use and benefit of the people of the county.

14. There is now justly due, owing and unpaid from the defendant National Surety Company under the terms of said bond in consideration of the premises the sum of $30,000.00, no part whereof has been paid, although payment has been often demanded.

15. Wherefore plaintiff prays judgment against said defendant in the sum of $30,000.00 its debt, together with 7% interest thereon from February 4, 1924 and costs of action.

M. J. O'Donnell, County Attorney, and E. D. & F. A. Crites, Attorneys for Plaintiff.

Duly sworn to by Edwin B. Lyon. Jurat omitted in printing.

[fols. 9 & 10] Præcipe for summons, filed October 7, 1924, omitted in printing.

Summons and sheriff's return, filed October 20, 1924, omitted in printing.

[fol. 11] In District Court of Sioux County

[Title omitted]

Petition for Removal to United States District Court—Filed November 7, 1924

To the Honorable W. H. Westover, Judge of the District Court of Sioux County, Nebraska:

Comes now the defendant, National Surety Company, and files this its petition for the removal of this case from the aforesaid District Court in which the same is now pending,

to the District Court of the United States in and for the District of Nebraska, Chadron Division, held in the city of Chadron in said district and state.

Your petitioner would show unto your honor:

1. That this cause was filed in this Court on the 7th day of October, 1924, and that the time to plead, answer or demur to the same has not expired under the laws of this state in such cases made and provided.

2. That this suit is civil in its nature, and one of which the District Courts of the United States have original jurisdiction, the same being an action by the plaintiff against the [fol. 12] defendant to recover from said defendant the sum of $30,000.00, together with interest and costs, upon a certain county depository bond, alleged to have been executed by the defendant.

3. That the matter in dispute exceeds the sum of Three Thousand Dollars, exclusive of interest and costs.

4. That at the time of the commencement of this suit, and since that time the plaintiff was and is now a resident of the state of Nebraska and the county of Sioux in said state, and that the defendant was at the time of the commencement of this suit, and since, and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and is and was at the time of the commencement of this suit, and since, a resident of the State of New York, having its principal place of business in the city and county of New York, in said state.

Your petitioner herewith files a good and sufficient bond under the statute in such case made and provided, conditioned as the law directs and that he will within thirty days from the filing of this petition for removal file a certified copy of the record of the case in the District Court of the United States for the District of Nebraska, Chadron Division, and for the payment of all costs which may be awarded by said Court if the said District Court shall determine that this suit was improperly and wrongfully removed thereto.

Your petitioner therefore prays the court that it proceed no further herein except to order the removal, accept the

bond herewith presented, and direct a transcript of the record to be made and certified as provided by law.

Honnold & Clarke.

Duly sworn to by R. C. Clarke. Jurat omitted in printing.

[fol. 13] [File endorsement omitted.]

Bond on removal for $500.00, approved and filed November 7, 1924, omitted in printing.

[fol. 14] In District Court of Sioux County

Notice of Filing of Petition and Bond for Removal—Filed November 7, 1924

To M. J. O'Connell and E. D. & F. A. Crites, attorneys for plaintiff:

Notice is hereby given that the defendant in the above entitled cause, the National Surety Company, will on the 7th day of November, 1924, file in the District Court of Sioux County of Nebraska, in which said suit is now pending, its petition and bond for the removal of the said cause from said State Court to the District Court of the United States for the District of Nebraska, Chadron Division.

Honnold & Clarke, Attorneys for Defendant.

Copy of the foregoing notice, together with petition and bond for removal, received, and service thereof accepted this 7th day of November, 1924.

M. J. O'Connell & E. & F. Crites, Attorneys for Plff.

[File endorsement omitted.]

In District Court of Sioux County

Demurrer to Petition—Filed November 8, 1924

Comes now the above-named defendant, and demurs to the petition of the plaintiff heretofore filed for the reason

[fol. 15] that the same does not state facts sufficient to constitute a cause of action.

National Surety Company, Defendant, by Honnold & Clarke, Its Attorneys.

[File endorsement omitted.]

In District Court of Sioux County

[Title omitted]

Order of Removal—Filed November 10, 1924

Now on this 8th day of November, 1924, this cause came on to be heard at Chambers, in the city of Rushville, Nebraska, and the defendant having within the time provided by law filed its petition for removal of this cause to the District Court of the United States for the District of Nebraska, Chadron Division, and having at the same time filed its bond in the sum of five hundred ($500.00) Dollars with good and sufficient surety, conditioned as by law required, it is ordered that said bond be and the same hereby is accepted and approved, and that this cause be removed for trial to the District Court of the United States for the District of Nebraska, Chadron Division, and that all proceedings in said cause in this Court be stayed.

W. H. Westover, Judge of the District Court.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 16] In United States District Court, District of Nebraska

Edwin B. Lyon, as Treasurer of the County of Sioux, Plaintiff,

vs.

The National Surety Company, Defendant

Amended Petition—Filed January 16, 1925

Comes now the plaintiff Edwin B. Lyon, as treasurer of the county of Sioux, in the state of Nebraska, by M. J. O'Connell, Esq., and Messrs. E. D. & F. A. Crites, his attorneys, and complaining of the defendant National Surety Company avers and respectfully shows to the court:

1. The county of Sioux on all of the dates hereinafter alleged was, ever since has been, and now is, a body politic and corporate, duly authorized, organized and existing as one of the counties of the state of Nebraska under the constitution and laws of the state of Nebraska.

2. This plaintiff now is and on all of the dates hereinafter alleged was, the duly elected, qualified and acting County Treasurer of said county of Sioux, for the term of four years commencing on the 4th day of January A. D. 1923 and that this plaintiff is now in the possession of said office and in the exercise of the powers, rights, duties and franchises thereof.

[fol. 17] 3. That the said defendant, National Surety Company, on all of the dates hereinafter alleged was, and now is, a corporation duly authorized, organized and existing as such under and by virtue of the laws of the state of New York, doing a general surety business with its principal office and place of business in the city of New York, in the state of New York, under the corporate name and style aforesaid, and that said National Surety Company on said dates was duly admitted, licensed and let in to do *in* the actual transaction of a general surety business in the county of Sioux, in the state of Nebraska.

4. That on all of said dates the First National Bank of Harrison was, and now is, a national banking corporation

duly authorized, organized and existing as such under the national banking laws of the United States with its principal office and place of business at Harrison in Sioux County, Nebraska, and until becoming insolvent, as hereinafter alleged, transacted a national banking business at Harrison, in the county of Sioux, under the corporate name and style aforesaid.

5. That under and by virtue of the provisions of law in that behalf it is the duty of this plaintiff to deposit and at all times keep on deposit for safe keeping in state, national or private banks doing business in the county of Sioux, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such County Treasurer, and that pursuant to the provisions of law in that behalf, the said, The First National Bank of Harrison, on the 26th day of December, A. D., 1922, then being located in said county of Sioux, did apply in writing to the Honorable The Board of County Commissioners of Sioux County, Nebraska, for the privilege of keeping such moneys upon deposit in said bank upon the following conditions: All such deposits to be subject to payment when demanded by the County Treasurer on his check, and interest to be paid thereon amounting to 2% per annum upon the amount so deposited as provided by law and subject also to such regulations as are imposed by law, and for the security of the funds so deposited under the provisions of law this plaintiff did require the said, The First National Bank of Harrison as such depositary to give bond for the safe keeping and payment of such deposits and the accre- [fol. 18] tions thereof, running to the people of the County to be approved by the County Board and conditioned that such depositary should, at the end of each and every month render to the Treasurer and County Board a statement, in duplicate, showing the several daily balances and the amount of moneys of the county held by it during the month, and the amount of the accretion- thereof, and how credited, and for the payment of the deposits and the accretions accrued thereon as provided by law, and for the payment of the deposits and the accretions thereon when demanded by the County Treasurer on his check at any time and generally to do and perform whatever might be re-

quired by the provisions of law and the faithful discharge of the trust reposed in such depositary.

6. That thereupon the said defendant, The National Surety Company, by its duly authorized agent and attorney in fact in consideration of a certain reward to it paid by the said, The First National Bank of Harrison, and in further consideration of the deposits of money to be made by this plaintiff in the said depositary bank. The First National Bank of Harrison in reliance upon such bond did, with the said First National Bank of Harrison as principal, duly make, execute and deliver to the plaintiff its depositary bond or obligation in writing running to The People of the County of Sioux, in the state of Nebraska, as obligee, conditioned as required by law, and as above recited and set forth, of which the following is a true and correct copy to-wit:

National Surety Company

County Depositary Bond

(Nebraska)

Know all men by these presents:

That we, First National Bank of Harrison, Nebraska
As Principal, and the National Surety Co. of New York, N. Y., as Surety are held and firmly bound unto the
people of the County of Sioux in the State of Nebraska, in the just and full sum of Thirty Thousand
and no/100 ..... Dollars ($30,000.00), for the payment of which, well and truly to
be made, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.
Dated this 12th day of December A. D. 1922.

[fol. 19]

Whereas, the said bank in consideration of the deposits of certain of the moneys of Sioux County
..... for safe keeping with and in First National Bank, Harrison, Nebraska the amount whereof shall be subject to withdrawal or diminution by said
County Treasurer, as the requirements of said County

shall demand, and which amount may be increased or decreased as the said Treasurer may determine; and,
Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay and
will pay to Sioux County the sum of not less than
two per cent (2%) per annum on account of said deposit, the same shall be paid quarterly upon the daily average
of the sum of such amount as the said bank shall have on deposit, for the quarter or any fraction thereof next preceding the
payment of said percentum, which shall be computed and credited to the account of Sioux County
and shall become a part thereof.
Now, therefore, if the said First National Bank
of Harrison, Nebraska shall at the end of every month render to the Treasurer of said
Sioux County and County Board a statement
in duplicate showing the daily balance of the Sioux County
moneys held by it during the month next preceding, and the accretions thereof, and *has* the same has been credited, and shall
well and truly keep all of said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of
County Treasurer, as aforesaid, and s-all pay over the same and each and every part
[fol. 20]
thereof, upon the written demand of the County Treasurer, and shall estimate, calculate and
pay said percentum as aforesaid, and to his successor in office as shall be by him demanded, and shall in all respects, save and
keep the County of Sioux and the said County
Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be
void, otherwise to be and remain in full force and virtue.

This bond to be and remain in full force for a period of Four Years beginning on the 4th day of January 1923, and ending on the 6th day of January 1927

In Testimony Whereof, the said First National Bank of Harrison, Nebraska the Principal, herein named, has caused this instrument to be signed *by* its name and behalf by its President, or Vice-President, attested by its Cashier, and its Corporate [Seal] to be hereto affixed, and the said National Surety Co., of New York, N. Y., the Surety herein named, has caused this instrument to be signed in its name and behalf by its Attorney-in-fact And attested by its common and corporate seal hereto affixed the day and year above written.

First National Bank, Harrison, by W. H. Davis, Vice-Preident. Attested: Theo Okerblade, Cashier.
[fol. 21] First National Bank of Harrison, Corporate Seal, Harrison, Nebr. National Surety Co., by Frank Wheeler, Attorney-in-Fact. National Surety Company, Incorporated 1897, New York.

STATE OF NEBRASKA,
Sioux County, ss:

Filed in the office of County Clerk this 26th day of Dec. 1922.

A. C. Davis, County Clerk.
Book C of Bonds, page 277.

Approved as to form and sufficiency & ordered filed.
W. B. Woodruff, Chairman Board Co. Commrs.
Henry Thomas.

7. And that thereupon the said bond was duly filed with the County Board of Commissioners of said county, together with the said application for approval.

8. Thereupon to-wit: On said 26th day of December A. D. 1922 the Honorable Board of the County Commissioners of said County of Sioux did duly act upon the application of the said, The First National Bank of Harrison, and did

accept and approve the said application, and did select said First National Bank of Harrison as such depositary and did accept and approve the said depositary bond so filed in behalf of said depositary bank and did give notice of such acceptance and approval to the said defendant, the National Surety Company, and thereupon the said, The First National Bank of Harrison became and was, and so remained, until the insolvency of said bank, a depositary bank of county funds under the provisions of law in that behalf and that this plaintiff, as such county Treasurer, pursuant to [paw] retained on deposit, and from time to time did deposit, and at all times did keep on deposit for safe keeping therein moneys in his hands collected and held by him as such County Treasurer in reliance upon the said bond above copied and set forth with the knowledge of the said defendant National Surety Company.

9. That the said depositary bond covered one term only of this plaintiff as County Treasurer to-wit: The official term commencing on the 4th day of January A. D., 1923.

[fol. 22] 10. On the 4th day of February A. D. 1924 this plaintiff, as such County Treasurer, had kept on deposit for safe keeping in said depositary bank to-wit: The said The First National Bank of Harrison, under and in reliance upon the said bond, moneys in his hands so collected and held by him as such County Treasurer to and in the amount of $35,395.70, and that the same was so deposited and then remained so on deposit in said depositary bank in an open account as a general deposit subject to the check or draft of this plaintiff as such County Treasurer and subject to disposition as provided by law and the conditions of said bonds, and that on said date the said, The First National Bank of Harrison, became and was insolvent and because of such insolvency ceased to do business as such, and closed its doors and refused to pay checks and drafts lawfully drawn thereon by this plaintiff, and its depositors, and the Comptroller of the Currency becoming satisfied of the insolvency thereof, after a due examination of its affairs, having found the same to be insolvent, with the approval and consent of the Secretary of the Treasury of the United States, pursuant to the authority vested in him by law on the 12th day of February A. D.

1924 did appoint one Ralph S. Pryce as receiver of the said insolvent bank, The First National Bank of Harrison and that on the said 12th day of February A. D. 1924 the said Ralph S. Pryce, having duly qualified as such receiver, took possession of the said bank and all of the money, deposits, and assets thereof including the deposit of this plaintiff therein for the purpose of closing the affairs of the said bank, and for the other purposes provided by law and ever since has been, and is now, the receiver of the said, The First National Bank of Harrison, and in possession of all of its moneys, deposits, properties and assets, and that the deposit above alleged and referred to and herein involved then had and held by this plaintiff in the said depositary bank was a deposit covered by the depositary bond above alleged, copied and set forth.

11. That by reason of said insolvency and the appointment of such receiver the said The First National Bank of Harrison incapacitated itself to make payment and delivery of the said moneys of this plaintiff as such County Treasurer so on deposit with it under said bond, but nevertheless this plaintiff has, from time to time, duly demanded payment of said deposits in said sum of $35,395.70 from the said bank and from its said receiver and has likewise, from time to time, prior to the institution of this suit, de-
[fol. 23] manded the interest accruing under said deposit and secured by said bond, but payment thereof has been refused by the said bank and its said receiver for want of funds wherewith to pay and discharge the same and the same has been wholly converted to the use of the said. The First National Bank of Harrison, and no accounting has been made therefor to this plaintiff either by said bank or its said receiver.

12. The said bank paid interest under the terms of said deposit on the said deposit up to the first day of January A. D. 1924, and that there is due under and unpaid from the said bank upon said deposit, interest at 2% per annum from that date on account of said deposit payable quarterly upon the daily average of the sum of such account as the said bank had on deposit for the quarter or any fraction thereof next preceding the payment of said percentum, and that the amount of said interest so accruing upon daily balances from the first day of January A. D.

1924 to the date of the insolvency of said bank and the demand by this plaintiff of payment of his deposit and the refusal of the said bank to-wit: The 4th day of February 1924 in the sum of $— which should be tacked to the principal sum, together with interest on the total at 7% per annum from the said 4th day of February A. D. 1924.

13. Plaintiff brings this action in his official capacity as treasurer of said county of Sioux for the use and benefit of the people of the county.

14. That under the provisions of Article IV of title 5 of the Civil Administrative Code of the state of Nebraska Comp. Stats. Neb. 1922 Section 7811 and other sections, it is provided that in all cases where the beneficiary or other person entitled thereto brings an action at law upon any policy of guarantee, fidelity, liability, or other insurance of a similar nature against any company doing business in this state, the court, upon rendering judgment against such company, shall allow the plaintiff a reasonable sum as attorneys fees in addition to the amount of the recovery to be taxed as part of the costs and if such case is appealed the appellate court shall likewise allow a reasonable sum as attorneys fee for the appellate proceedings, and that under the provisions of the statute of the state of Nebraska the plaintiff is entitled to have allowed him such reasonable attorneys fee in addition to the amount of his recovery to be taxed as part of the cost herein.

[fol. 24] 15. That there is now justly due, owing and unpaid from the defendant National Surety Company under the terms of said bond in consideration of the premises the sum of $30,000.00 no part whereof has been paid, although payment has been often demanded.

Wherefore plaintiff prays judgment against said defendant in the sum of $30,000.00 its debt, together with 7% interest thereon from February 4, 1924, together with costs of action including a reasonable sum as the plaintiff's attorney fee in addition to the amount of such recovery to be taxed as part of the costs of this action.

M. J. O'Connell, E. D. & F. A. Crites, Attorneys for Plaintiff.

Duly sworn to by Edwin B. Lyon. Jurat omitted in printing.

In United States District Court

Answer to Amended Petition—Filed June 4, 1925

Defendant for answer to the amended petition of the plaintiff admits paragraph One, Two, three and four thereof.

2. The defendant for answer to paragraph six admits the signing execution and delivery of the written instrument set forth in paragraph six of plaintiff's amended petition and that said written instrument bears upon the face thereof the endorsements as to filing and approval.

[fol. 25] 3. For answer to paragraph seven of the amended petition admits that said bond was filed with the County Board of Commissioners of said County.

4. For answer to paragraph Ten of said amended petition admits that on the 4th day of January, 1924 there was on deposit in the First National Bank of Harrison a deposit in the name of Edwin B. Lyons, County Treasurer amounting to $35,395.07, that the First National Bank of Harrison became insolvent and ceased to do business and that one Ralph S. Pryce was appointed receiver of said Bank and that the said Pryce on the 12th day of February, A. D. 1924, having duly qualified as receiver took possession of said Bank and all the assets thereof, and that he is now the receiver of said Bank.

5. Defendant for further and additional answer to the said amended petition denies each and every allegation therein contained not hereinbefore specifically admitted.

6. Defendant for further and additional answer to the amended petition of plaintiff alleges and says; that at all times mentioned in the amended petition of the plaintiff the First National Bank of Harrison, Nebraska was a National Bank with an authorized capital of $50,000 and having in truth and in fact no paid up capital in excess of $50,000; that under and by virtue of the laws of the State of Nebraska

the Treasurer of Sioux County, Nebraska was forbidden to deposit in said Bank any sum or sums in excess of 50% of the paid up capital of said bank and at the time of the making and executing of said bond and the filing thereof with the County Clerk and any action thereon by the County Board of Sioux County, Nebraska it was well known and understood by all parties to said bond that the County Treasurer of Sioux County, Nebraska was limited in the deposits he made in the First National Bank of Harrison to 50% of the paid up capital thereof and that until the capital stock of said bank was increased the full amount of the penalty of said bond could not be deposited in said bank, and said bond was made, executed and delivered solely for the purpose of securing any deposits that the County Treasurer of Sioux County, Nebraska might make in said Bank as authorized by the laws of the State of Nebraska and accrued interest as in said bond provided and that said bond in truth and in fact did not and does not secure repayments of money deposited in excess of one half of the paid up capital stock of said bank to wit: $25,000 and [fol. 26] interest thereon at 2% per annum from the 1st day of January, 1924 to the 4th day of January, 1924.

7. This answering defendant further alleges and says: that the plaintiff herein realizing and acknowledging that the bond of the defendant was to secure repayment of deposits not in excess of 50% of the capital stock of said Bank did on the 10th day of January, 1923, as a condition to make or keep on deposit in said First National Bank of Harrison, Nebraska any sums in excess of 50% of the Capital stock of said First National Bank of Harrison, Nebraska, cause said First National Bank of Harrison, Nebraska to make and deliver unto the plaintiff herein individually a certain undertaking signed by six residents of Sioux County, Nebraska which said undertaking was in the penal sum of $10,000 conditioned to indemnify and keep the plaintiff herein individually harmless by reason of making said excess deposits in the First National Bank of Harrison, Nebraska and the deposits therein made in excess of 50% of the capital stock of said Bank were made in reliance of said undertaking last named and not in pursuance to or on reliance of the bond set forth in this petition.

Wherefore defendant having fully answered the prayer of plaintiff's petition prays that it may go hence without day and recover costs of suit herein expended.

Honnold & Clarke, Mothersead & York, Attorneys for Defendant.

Duly sworn to by R. C. Clarke. Jurat omitted in printing.

[fol. 27] In United States District Court

Motion to Strike Answer—Filed September 12, 1925

Comes now the plaintiff by E. D. & F. A. Crites his attorneys, and moves the court for an order striking out of the defendants answer herein, all of paragraph 6 thereof and all of paragraph 7 thereof, for all of the following reasons to-wit:

The matters and things sought to be pleaded, alleged and set forth are not material; that the same do not constitute or tend to constitute any defense herein; that the same is frivolous and the said defendant is estopped by its bond from alleging, pleading or proving the matters and things set forth in said paragraphs; that the obligee in said bond, the people of the county of Sioux, are not estopped by any of the alleged acts of the treasurer of said county claimed by the defendant to be illegal.

This motion is made separately as to each of said paragraphs.

E. D. & F. A. Crites, Attorneys for Plaintiff.

In United States District Court

Reply—Filed September 12, 1925

Comes now the plaintiff, Edwin B. Lyon as county treasurer for the county of Sioux in the state of Nebraska, and for reply to the answer of the defendant filed herein, denies generally each and every allegation of new manner therein contained.

1. That the people of the county of Sioux are not estopped by acts of misfeasance on the part of its officers, and that the said county did not contract with the defendant as surety on said bond to the effect that the said treasurer of said county should and would perform his public duties faithfully, or that he would not deposit in the said First National Bank of Harrison, public moneys in his possession as such treasurer in excess of the sum of $25,000.00; that the said defendant at all times well knew and understood such fact and by virtue and in consequence of the execution of said bond did consent to be bound by it, and that it became liable for public moneys deposited in said bank by said treasurer in the sum of $30,000.00 as provided by said bond; [fol. 28] that the said First National Bank of Harrison and the said defendant its surety, having, by means of said bond, secured possession of public funds of the people of the county of Sioux are estopped and barred from pleading or attempting to prove any want of liability to perform the condition of said bond, that is, to pay the penalty thereof, namely the sum of $30,000.00 upon the closing of the doors of said bank, it then having on deposit under such bond the said sum of $35,395.70; that the obligation of the defendant as surety as written in said bond is the sum of $30,000.00, and that premiums were paid to and received by the defendant on the basis of a liability and obligation of $30,000.00 and said defendant is now estopped and barred to plead or attempt to prove a less obligation or liability, it having admitted in its answer herein the amount of the deposit of such moneys as aforesaid, in excess of such sum; that the amount of defendants liability thereunder is not contingent in any way upon the neglect of the treasurer of said county, or the legality of his actions; that the said defendant is estopped and barred by all of said facts and the recitals in said bond from pleading and proving its alleged defense herein.

For further reply to said answer, plaintiff alleges that defendant is estopped and barred to plead or prove that the action of its principal in accepting a deposit from the treasurer of said county in excess of $25,000.00 is a bar to the right of the people of the county of Sioux to maintain an action and to recover herein the amount of the said Bond

to wit: The sum of $30,000.00 with interest from the date of closing of said bank.

Wherefore plaintiff prays judgment as he heretofore has done.

E. D. & F. A. Crites, Attorneys for Plaintiff.

Duly sworn to by Edwin D. Crites. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—September 18, 1925

This cause coming on for hearing this 18th day of September, 1925 in open court, Plaintiff appearing by Messrs E. D. & F. A. Crites, his attorneys, and Defendant appearing by Messrs. Honnold & Clarke, and the hour of 4:30 P. M. having arrived and the conclusions of the Hon. Court not being yet given, it is

Ordered, that Court adjourn until Tuesday Sept. 18, 1925.

Attest:

R. C. Hoyt, Clerk, by L. J. F. Iaeger, Deputy Clerk.

[fol. 30] IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY—Filed September 14, 1925

It is hereby stipulated that a jury trial be waived and this cause may be tried to the Court.

M. J. O'Connell and E. D. & F. A. Crites, Attys. for Plff. Mothersead & York & R. C. Clarke, Attys. for Deft.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed September 22, 1925

This cause, this 18th day of September A. D., 1925, the same being a regular day of said term came on to a trial in open court upon the pleading and the evidence, the plaintiff appearing by Messrs. E. D. & F. A. Crites, his attorneys, and the defendant by Messrs. Homold & Clarke and by Messrs. Mothersead & York, its attorneys, and is submitted to the court, a jury trial having been waived by stipulation in writing, duly made and filed prior to the trial, upon consideration whereof the court finds generally, in favor of the plaintiff and against the said defendant, finds that all of the facts stated and allegations in plaintiff's petition are true, that the said defendant is estopped and barred from pleading or proving the matters and things set forth in its answer herein, and that no defense has been proven on the part of the defendant to the plaintiff's cause of action, and that there is justly due and owing from the defendant to plaintiff under the depositary bond pleaded in the petition, the sum of $30,000.00, with [75] interest thereon from February 4, 1924, for which sum plaintiff is entitled to judgment against the defendant to of which findings the said defendant duly excepts; and the plaintiff having prayed for an order fixing and allowing a fee for its attorneys to be taxed as costs under the Nebraska statute, and the court not being fully advised in the premises, the cause is continued until next [*Teus*day] morning the 22nd day of September 1925 for judgment.

[fol. 31] And now on this 22nd day of September, 1925, the same being a regular day of said term, the parties appearing as before, and the court having maturely considered of the law and the premises, finds that the plaintiff is entitled, under the statute, to the taxation of a fee for his attorneys as costs herein, and upon the evidence of the [paries] this day submitted as to the amount to be allowed, further finds that the firm of E. D. & F. A. Crites, the plaintiff's attorneys, have had entire charge of and responsibility for the action in behalf of plaintiff and upon

consideration of the value of the services of said attorneys to the plaintiff, the amount of time and labor expended by them, that the sum of $3,000, is a reasonable allowance for a fee for said attorneys, and that such sum does not bear an unfair proportion to the amount of the judgment herein recovered, to which finding defendant duly excepts.

It is therefore considered and adjudged by the court here, that the plaintiff do have an recover of and from the defendant the sum of $33,492.50 together with its costs herein expended to be taxed and that this judgment bear interest at 7% per annum from this date until fully paid.

It is further ordered by the court that the sum of $3,000.00 be, and the same is hereby allowed to the plaintiff as a fee for said E. D. & F. A. Crites, his attorneys and that the clerk of this court do tax the same as costs, against the said defendant, in addition to said judgment, said sum to bear no interest, to which order the defendant excepts.

Same day said cause came on further to be heard on defendants motion to vacate and set aside findings and judgment, and to grant a new trial of the issues joined and is submitted to the court, the parties appearing as before upon consideration whereof the court finds that the same is not well taken, and doth over-rule and deny said motion, to which order the defendant excepts.

By the Court:

J. W. Woodrough, Judge.

[fol. 32] In United States District Court

Petition for Writ of Error—Filed November 18, 1925

To the Hon. J. W. Woodrough, Judge of the District Court aforesaid:

Now comes National Surety Company, a corporation by its attorney and respectfully shows that on the 22nd day of September, 1925 the Hon. District court of the United States for the District of Nebraska, Chadron Division, on trial of an action of law therein to said court wherein a jury had been waived in writing before the trial, made a finding and judgment against your petitioner in favor of

Edwin B. Lyon as the County Treasurer of the County of Sioux, defendant herein.

Your petitioner feeling itself aggrieved by the said finding and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit court of Appeals of the United States for the 8th Circuit court under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Court of appeals sitting at St. Louis in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the circuit court of appeals.

Honnold & Clarke, Mothersead & York, Attorneys for National Surety Company.

In United States District Court

Order Allowing Writ of Error—Filed November 18, 1925

Now on this 2nd day of November, 1925 the petition of the defendant, National Surety Company for writ of Error herein came on to be heard, and the Court being fully advised inthe premises find that the prayer of said petition should be granted.

[fol. 33] It is therefore Ordered that writ of error herein is issued to Edwin B. Lyons as County Treasurer of Sioux County & Supersedeas bond is fixed in the sum of $40,000.00 such bond when approved to act as a supersedeas.

J. W. Woodrough, Judge of the District Court of the United States for the District of Nebraska.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed November 18, 1925

Now comes the National Surety Company, plaintiff in error in the above entitled cause and in connection with its petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred at the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record.

1. The court erred in making and finding judgment for the plaintiff, the defendant in error herein and against the defendant, the plaintiff in error herein for any amount whatsoever in excess of Twenty five thousand dollars and interest thereon, the same being one half the amount of the paid up capital of the First National Bank of Harrison.

2. The court erred in finding and holding that the defendant, plaintiff in error herein on the bond executed in this action was liable for any amount of the funds of Sioux County, Nebraska, deposited in the First National Bank of Harrison, Nebraska in excess of Twenty five thousand Dollars, that being one half of the amount of the paid up capital of said bank.

3. The court erred in not determining and adjudging that the bond on which action is brought in this case and which the defendant, plaintiff in error in this case, executed secured deposits of the county funds of Sioux in the First National Bank of Harrison, should be read and construed in connection with the laws of the State of Nebraska governing the deposit of County funds in banks and prohibiting the deposit of county funds in any bank in excess of 50% of the paid up capital of said bank so that the liability of [fol. 34] this defendant under said bond would not be in excess of one half of the paid up capital stock of the First National Bank of Harrison, to wit: $25,000.00.

4. The judgment of the court was erroneous in this, that the same is excessive in the amount of $5,000 together with interest from the 4th day of February, 1924.

5. The court erred in allowing as part of the costs of said action attorney fees to the counsel for the plaintiff in the court below, defendant in error herein.

6. The court erred in holding and determining that the statutes of the state of Nebraska relative to costs in actions on surety bonds governed and controlled the Federal Courts.

7. The amount of attorney fees taxes for plaintiff as part of the costs of said action is excessive.

8. The court erred in overruling motion for new trial by the plaintiff in error in said action.

To all of the above matters at the time of the happening thereof the defendant, plaintiff in error herein duly excepted and said exceptions were duly allowed by the court.

Wherefore the defendant, National Surety Company, plaintiff in error herein prays that the judgment of the District court of the United states for the District of Nebraska, Chadron Division be reversed and judgment rendered in favor of the defendant, National Surety Company for costs.

Honnold & Clarke, Mothersead & York, Attys. for National Surety Company, Plff. in Error.

IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT OF ERROR AND CLERK'S RETURN—Filed November 18, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judge of the District Court of the United States for the District of Nebraska, Chadron Division, Greeting:

[fol. 35] Whereas, in the records and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, at the September 1925 term thereof, between Edwin B. Lyon as County Treasurer of the County of Sioux, plaintiff and National Surety Company, defendant, a manifest error hath happened, to the great damage of the said National Surety Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the eighth circuit, on or before the — day of December, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Wm. H. Taft, Chief Justice of the United States this 2nd day of November, 1925 in the year of our Lord, One thousand nine hundred twenty five.

Issued at Chadron, Nebraska with the seal of the District Court of Nebraska and dated as aforesaid.

R. C. Hoyt, Clerk of the District Court of the United States for the District of Nebraska, by L. J. F. Iaeger, Deputy. (Seal U. S. Dist. Court, Chadron Div., Dist. of Nebr.)

Allowed by J. W. Woodrough, United States District Judge.

[fol. 36] Return to Writ of Error

United States of America,
District of Nebraska,
Chadron Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things [things] concerning the same.

In witness whereof, I hereto subscribe my name [my name] and affix the seal of said District Court, at my office

[on] the City of Chadron this 18th day of January, A. D. 1926.

R. C. Hoyt, Clerk, by L. J. F. Iaeger, Deputy. (Seal U. S. Dist. Court, Dist. of Nebr., Chadron Div.)

[File endorsement omitted.]

Citation, in usual form, showing service on Edwin D. Crites, filed November 23, 1925, omitted in printing.

[fol. 37] Bond on writ of error, approved and filed November 23, 1925, omitted in printing.

[fol. 38] In United States District Court

Bill of Exceptions—Filed December 17, 1925

Caption

Be it Remembered that on the 14th day of September, 1925, at the regular September, 1925, term of the District Court of the United States for the District of Nebraska, Chadron Division, Honorable J. W. Woodrough, Judge, presiding, the above entitled cause was called for trial, a jury waived in writing by the parties before the trial, and the trial commenced and continued and was concluded on said 14th day of September, 1925; E. D. Crites, Esq., and F. A. Crites, Esq., appearing for plaintiff and R. T. York, Esq., and R. C. Clark, Esq., appearing for defendant; at which trial the plaintiff introduced and offered in evidence the following stipulation which was made in open court in said cause in the words and figures following:

[fol. 39] [Title omitted]

Stipulation of Facts

Appearances: E. D. & F. A. Crites, Attorney- for Plaintiff; Honnold & Clarke and Mothershead & York, Attorneys for Defendant.

Be it Remembered:

That on the 14th day of September, A. D. 1925, that being one of the days of the stated September, A. D. 1925 sitting of the District court of the United States for the District of Nebraska, Chadron Division, held in said division in the city of Chadron in the County of Dawes therein, the above entitled cause came on for hearing for trial before the court, the Honorable J. W. Woodrough, District Judge, presiding; and that to maintain the issue joined the above named parties introduced in evidence the following stipulation which was made in open court in the above entitled cause in the words, letters and figures following, that is to say:

For the purposes of the trial of this cause it is hereby mutually stipulated, conceded and agreed by and between the parties thereto that the facts hereinafter recited are true; that said cause be heard, tried, submitted and decided by the court upon this stipulation, which shall be the evidence in the case, namely:

1. That the county of Sioux on all of the dates involved herein was and now is a body politic and corporate, duly authorized and existing as one of the counties of the state of Nebraska under the constitution and laws of said state.

2. That the plaintiff now is and on all other dates involved herein was the duly elected, qualified and acting county treasurer of said county of Sioux, and was so elected and qualified for the term of four years, commencing on the 4th day of January, 1923, and is now in possession of said office and the exercise of the rights, duties, and franchises thereof.

3. That the Defendant National Surety Company, on all said dates was and now is a corporation duly authorized, organized and existing as such under and by virtue of the [fol. 40] laws of New York, and duly licensed, admitted and let in to do a surety business in the State of Nebraska as alleged in the petition.

4. On all said dates the First National Bank of Harrison in the State of Nebraska was and now is a national banking corporation, duly authorized, organized and existing as such under the National Banking Act of the United States, with

its principal office and place of business at Harrison, in Sioux County, Nebraska, with a paid up capital stock of fifty thousand dollars; and until becoming insolvent as hereinafter stipulated, transacted a national banking business at Harrison in said county; and that Harrison is the county seat of the said county of Sioux.

5. That under and by virtue of the provisions of the statutes of the state of Nebraska and the laws thereof in that behalf, it is and was at all times the duty of the plaintiff as such County Treasurer to deposit and at all times to keep on deposit for safe keeping in state, national or private banks doing business in the county of Sioux and of approved and responsible standing the amount of moneys in his hands collected and held by him as such county treasurer, the statutes of Nebraska providing, however, "The amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent out of the paid capital stock of such bank."

6. That pursuant to the provisions of statute in that behalf the said The First National Bank of Harrison on the 26th day of December, 1922, then being located in said county of Sioux, did apply in writing to the Board of County Commissioners of Sioux County, Nebraska, for the privilege of keeping such moneys upon deposit in said bank upon the following conditions: "All such deposits to be subject to payment when demanded by the County Treasurer on his check, and interest to be paid thereon, amounting to two per cent per annum upon the amount so deposited, as provided by law, and subject also to such regulations as are imposed by law," and for the security of the funds so deposited under the provisions of law, the County Commissioners did require the said The First National Bank of Harrison as such depositary to give bond for the safe keeping and payment of such deposits and the accretions thereof running to the people of the county, to be approved by the County Board, and conditioned that such depositary should at the end of each and every month render to the Treasurer and [fol. 41] County Board a statement in duplicate showing the several daily balances and the amounts of money of the county held by it during the month and the amount of the

accretion thereof, and how credited, and for the payment of the deposits and the accretions accrued thereon as provided by law, and for the payment of the deposits and the accretions thereon when demanded by the County Treasurer on his check at any time, and generally to do and perform whatever might be required by the provisions of law and the faithful discharge of the trust reposed in such depositary.

7. That thereupon the said defendant the National Surety Company, by its duly authorized agent and attorney in fact, in consideration of a certain premium and reward to it paid by the said the First National Bank of Harrison, and in further consideration of the deposits of money to be made by the plaintiff in said depositary bank. The First National Bank of Harrison in reliance upon such bond did, with the said The First National Bank of Harrison as principal, duly make, execute and deliver to the plaintiff its depositary bond or obligation in writing running to the people of the County of Sioux in the State of Nebraska as obligee, and conditioned as required by law, and that a true copy of said bond is set out in the Plaintiff's amended petition filed herein which copy is incorporated into this stipulation by reference as fully to all intents and purposes as though the original bond were produced and included in this stipulation; that said bond was duly approved by the Board of County Commissioners of said county of Sioux, both as to form and sufficiency, and ordered filed, and the same was on the 26th day of December, 1922, duly filed and entered of record in the records of said county of Sioux by the Clerk of said county, and said bond was thereupon delivered to the proper authorities of said county, who are yet in the possession thereof, and that the same is in full force and effect, and never has been cancelled; that the First National Bank of Harrison has paid the premium accruing under said bond, which premium money was accepted and retained by the defendant.

8. It is further stipulated and agreed between the parties that all of the allegations of paragraphs 8 and 9 of the amended petition are true and the facts therein contained are hereby made a part of this stipulation of fact as fully

to all intents and purposes as though written out at length herein.

[fol. 42] 9. On the 4th day of February, 1924, this plaintiff as such county Treasurer of the county of Sioux had and kept on deposit for safe keeping in said depositary bank, to-wit: the said The First National Bank of Harrison, moneys in his hands so collected and held by him as such County Treasurer to and in the amount of $35,395.70, and that the same was so deposited and then remained so on deposit in said depositary bank in an open account as a general deposit; subject to the check or draft of the plaintiff as such County Treasurer, and subject to disposition as provided by law, and the conditions of said bond; and that the said County Treasurer had deposited during the time intervening between the date of said bond and the date of the failure of said bank hereinafter referred to, a sum equal to $30,000.00 and more.

10. That on said 4th day of February, 1924, said The First National Bank of Harrison became and was insolvent, and because of such insolvency ceased to do business as such, and closed its doors and refused to pay checks and drafts lawfully drawn thereon by this Plaintiff and its other depositors; and the comptroller of the currency on the 12th day of February, 1924, having found said bank to be insolvent, did duly and legally appoint one Ralph S. Price as Receiver of said insolvent bank, and that said Price qualified and took possession of the said bank and all of the money, deposits, and assets thereof, including the deposit of the plaintiff therein on the 12th day of February, 1924, for the purpose of closing up the affairs of the bank, and for the purposes provided by law, and is now in possession of said assets.

11. No part of the said deposit of $35,395.70 of the said Treasurer at the time of the closing of said bank has ever been repaid the Plaintiff, nor has any interest thereon been paid to the Plaintiff, although demanded. That the least credit made by said bank of interest to said account was on the first day of January, 1924, which was in full to that date, and that the average daily deposits during the period of time intervening between the first day of January, 1924, and the closing of the doors of said bank, namely, February

4, 1924, is $28,793.10, and that no interest was credited to said account on the average daily deposits subsequent to January 1st, 1924.

12. That plaintiff has demanded payment of the amount of said bond, together with interest from the date of the closing of the bank of the Defendant National Surety Company, but same has been entirely refused. The defendant, [fol. 43] however, at all times has been ready, able and willing to pay their admitted liability of $25,000.00 under said bond, which plaintiff has at all times refused to accept; but no actual tender of any amount has ever been made.

13. That on the 10th day of January, 1923, the said The First National Bank of Harrison, Nebraska, as principal, and six parties whose names appear thereon, executed and delivered to the County Treasurer of Sioux county, Nebraska, the Plaintiff herein, a certain depositary bond to secure the sum of $10,000.00, a true copy of which said bond is hereto attached and marked Exhibit "A" and made a part of this stipulation. That said bond was duly filed in the office of the County Clerk of Sioux county, Nebraska, on or about the day of its date, but never was presented to or acted upon by the Board of County Commissioners of said county of Sioux.

14. A true copy of said depository bond sued on herein is hereto attached marked "B" and made part hereof.

I hereby certify that the above and foregoing is a true and complete transcript of said stipulation and all of the testimony offered or given by either of the parties hereto upon the trial of this cause, as shown by my shorthand notes taken upon the trial of the cause.

Beatrice Yanders, Shorthand Reporter, who reported said cause.

EXHIBIT "A" TO STIPULATION

Excess Bond

Know all men by these presents:

That the First National Bank of Harrison, Nebraska, as Principal, and W. F. Shepherd, Con Parsons, W. L.

Hoyt, W. H. Davis, Theo. Okerblade, and A. L. Schurr, as sureties are held and firmly bound unto E. B. Lyons, in the penal sum of Ten Thousand and no/100 dollars lawful moneys of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that Whereas, the above bounden First National Bank of Harrison, Nebraska, has become a depository for funds belonging to [fol. 44] to said E. B. Lyon or deposited by him in said First National Bank of Harrison, Nebraska, and Whereas said Bank in consideration of said deposit and for the privilege of keeping the same, has agreed to pay and will pay to E. B. Lyon, the sum of not less than two per cent per annum on account of said deposit, the same shall be paid upon the daily average balance of the sum of such amount as the bank shall have on deposit,

Therefore if the said bank shall well and truly keep said sums so deposited subject to the check or order of said E. B. Lyon, upon written demand and shall keep the said E. B. Lyon harmless and indemnified for and by reason of making said deposits, and if the said First National Bank of Harrison, Nebraska, shall well and truly do and perform the aforesaid condition and undertaking in each and every respect, and all the duties arising therefrom on their part to be kept and performed, then and [then] in such case this bond shall be null and void; otherwise to be and remain in full force and effect.

Witness our hands this 10th day of January, 1923.
Attest:

First National Bank, Harrison, Nebr., by A. L. Schnurr, President. W. F. Shepherd, Con Parsons, W. L. Hoyt, W. H. Davis, Theo Okerblade, A. L. Schnurr.

Attest: Theo. Okerblade, Cashier.
In presence of Laura H. Unitt.
Exhibit "A."

EXHIBIT "B" TO STIPULATION

National Surety Company

County Depository Bond

(Nebraska)

Know all men by these presents:

That we, First National Bank of Harrison, Nebraska As Principal and the National Surety Co. of New York, N. Y. as surety are held and firmly bound [fol. 45] unto the People of the County of Sioux in the state of Nebraska, in the just and full sum of Thirty Thousand and no/100 ..... Dollars ($30,000.00), for the payment of which, well and truly to be made, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Dated this 12th day of December A. D. 1922.

Whereas, the said bank in consideration of the deposits of certain of the moneys of Sioux County for safe keeping with and in First National Bank, Harrison, Nebraska the amount whereof shall be subject to withdrawal or diminution by said County Treasurer, as the requirements of said County Shall demand, and which amount may be increased or decreased as the said Treasurer may determine; and,

Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay and Will pay to Sioux County the sum of not less than Two per cent (2%) per annum on account of said deposit, the same shall be paid quarterly upon the daily average Of the sum of such amount as the said bank shall have on deposit for the quarter or any fraction thereof next preceding the payment of said percentum, which shall be computed and credited to the account of Sioux County

And shall become a part thereof.
Now therefore, if the said First National Bank of Harrison, Nebraska shall at the end of every month render to the Treasurer of said Sioux County and County Board a statement In duplicate showing the daily balance of the Sioux [fol. 46] County moneys held by it during the month next preceding, and the accretions thereof, and how the same has been credited, and shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of County Treasurer, as aforesaid, and shall pay over the same and each and every part thereof, upon the written demand of the County Treasurer, and shall estimate, calculate and pay said percentum as aforesaid, and to his successor in office as shall be by him demanded, and shall in all respects, save and keep the County of Sioux and the said County Treasurer harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void; otherwise to be and remain in full force for a period of four years beginning on the 4th day of January 1923, and ending on the 6th day of January 1927.

In Testimony Whereof, the said First National Bank of Harrison, Nebraska, the principal, herein named, has caused this instrument to be signed in its name and behalf by its President, or Vice-President, attested by its Cashier, and its Corporate Seal to be hereto affixed, and the said National Surety Co., of New York, N. Y., the Surety herein named has caused this instrument to be signed in its name and behalf by its Attorney-in-fact

38 and attested by its common and corporate seal hereto affixed the day and year last above written.

First National Bank, Harrison, by W. H. Davis, Vice-President. Attested: Theo Okerblade, Cashier. (Corporate Seal First National Bank of Harrison, Harrison, Nebr.) National Surety Co., by Frank Wheeler, Attorney-in-fact. Na-
[fol. 47] tional Surety Company, New York. Incorporated 1897.

State of Nebraska,
Sioux County:

Filed in the office of the County Clerk this 26th day of Dec. 1922.

A. C. Davis, County Clerk.

Book C of Bonds, page 277.

Approved as to form and sufficiency & order filed.
W. B. Woodruff, Chairman Board Co. Commrs.
Henry Thomas.

Stipulation Approving Bill of Exceptions

It is hereby stipulated and agreed by and between Edwin B. Lyon as County Treasurer of the County of Sioux, plaintiff herein, and National Surety Company, Defendant herein, that the foregoing bill of exceptions contains all of the evidence given or offered on the trial of the case of Edwin B. Lyon as county Treasurer of the County of Sioux, Plaintiff, vs. National Surety Company, defendant, tried in the District Court of the United States for the District of Nebraska, Chadron Division, at the September term, A. D. 1925, thereof, and correctly shows the proceedings had on said trial; that said bill of exceptions is correct in all respects; that the same may be signed, settled and allowed, and made a part of the record in said cause by the Honorable W. W. Woodrough, the Judge who presided at the trial of said cause, without further notice to plaintiff or his counsel.

Honnold & Clark, Mothersead & York, Attorneys for Plaintiff. Edwin D. Crites, Attorneys for Plaintiff.

[fol. 48] (Prayer of Defendant for Approval of Bill of Exceptions)

Now, in furtherance of Justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed, signed and certified by the court, and made a part of the record in this cause as provided by law.

Honnold & Clark, Mothersead & York, Attorneys for Defendant.

In United States District Court

Order Settling Bill of Exceptions

The foregoing bill of exceptions contains all of the evidence given or offered on the trial of the cause of Edwin B. Lyons as County Treasurer of the County of Sioux, Plaintiff, vs. National Surety Company, defendant, and correctly shows the proceedings had on said trial, and said bill of exceptions is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Dated at Omaha, Nebraska, this 14th day of December, 1925.

J. W. Woodrough, Judge who presided at said trial.

In United States District Court

Motion for New Trial—Filed October 1, 1925

Comes now the Defendant, the National Surety Company, and moves the Court to set aside and vacate the judgment in the above entitled action, and to grant a new trial thereof, for the following reasons:

1. The judgment is contrary to law.
2. The judgment is contrary to the evidence.
3. The judgment is not supported by the evidence.

4. The Court erred in allowing attorney's fees to the plaintiff to be taxed as costs against the defendant.

5. The sum allowed as attorney's fees is excessive.

6. The Court erred in assessing the amount of recovery.

National Surety Company, Defendant, by Honnold & Clark and Motherstead & York, Its Attorneys.

[fol. 49] In United States District Court

Order Overruling Motion for New Trial

"Same day said cause came on further to be heard on defendant's motion to vacate and set aside findings and judgment, and to grant a new trial of the issues joined, and is submitted to the Court, the parties appearing as before, upon consideration whereof the Court finds that the same is not well taken, and doth overrule and deny said motion, to which order the defendant excepts.

By the Court:

J. W. Woodrough, Judge.

Filed Sept. 22nd, 1925."

In United States District Court

Præcipe for Transcript of Record—Filed December 14, 1925

To the Clerk of said Court:

You will please make a return to the writ of error issued herein by transmitting to the United States Circuit Court of Appeals within and for the Eighth Circuit at the City of St. Louis Missouri, under your hand and seal of said court, a true copy of the record herein, including the transcript of the proceedings in the District Court of Sioux County, Nebraska, the amended petition, the answer, the motion to strike out answer, the reply, the trial proceedings, the waiver of jury, the findings and judgment, petition for writ

of error, assignment of errors, order allowing writ of error, writ of error, citation and return of service thereon, the bond, the bill of exceptions, the motion fo- a new trial and ruling thereon, this præcipe, and the Clerk's certificate, and all other proceedings in the case.

National Surety Company, by Honnold & Clarke, Mothersead & York, Its Attorneys.

Service of this præcipe hereby accepted this 7th day of December, 1925.

Edwin D. Crites, Attorney for Defendant in Error.

[fol. 50] In United States District Court

Order Extending Time to File Transcript—Filed December 17, 1925

On this 14th day of December 1925, it is ordered that the clerk of said court have until the first day of February 1926 in which to complete and transmit the record in the above cause in the Circuit Court of Appeal Eighth Circuit.

Clerk enter this order.

J. W. Woodrough, Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] Appearances of counsel omitted in printing.

[fol. 52] United States Circuit Court of Appeals, Eighth Circuit

Motion for Allowance and Taxation of Attorney's Fees for Defendant in Error on Appeal—Filed September 15, 1926

Comes now the Defendant in Error, the County of Sioux, and moves the court for an order allowing the Defendant

in error a reasonable sum as Attorney's fees for the appellate proceedings to be taxed as part of the costs of the appeal in compliance with the requirements of Section #7811, Comp. Stats. Nebr. 1922.

E. D. & F. A. Crites, Attorneys for Defendant in Error.

Affidavit

STATE OF NEBRASKA,
County of Dawes, ss:

Edwin D. Crites, being duly sworn on oath deposes and says, that he is one of the Attorneys for the Defendant in error in the above entitled cause and makes this affidavit on said Defendant's behalf.

That he is one of the firm comprised of Edwin D. Crites and Frederick A. Crites, copartners, under the Firm name of E. D. and F. A. Crites.

[fol. 53] That this affiant has personally had entire charge of this litigation from the time of its inception to the date of making this affidavit and intends to argue the same before the Court at Denver in the State of Colorado where same is to be submitted.

That both members of said Firm are duly admitted. licensed and practising attorneys of the Supreme Court of the State of Nebraska, and interior State Courts, and of the Circuit and District Courts of the United States for the District of Nebraska and of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

And that affiant was admitted in the State Supreme Court, in the Circuit and District Courts of the United States in the year 1908, and shortly thereafter in the said United States Circuit Court of Appeals for the Eighth Circuit.

And that recovery had in the Court below amounts to the sum of $33,492.50, and that the said judgment has not been paid nor any part thereof nor has payment thereof been rendered, nor has any sum been paid into court and,

That the defendant in Error has had to follow this appeal for the recovery of the entire judgment.

This affiant as such attorney has had charge of all the preliminaries as to docketing the said appeal; that he examined the transcript and bill of exceptions, and that there-

after in due time affiant examined the printed records filed on the appeal on behalf of the plaintiff in error, authorities cited therein, and prepared, printed and filed the brief of the defendant in error comprising twenty-two printed pages.

That the residence of the affiant is about 400 miles from Denver where the cause is to be submitted and that the greater part of three days' and two nights' time will be [fol. 54] necessarily consumed in proceeding from affiant's home to the City of Denver, there arguing the case and returning therefrom.

That Affiant has been established in the City of Chadron for eighteen years, there has a reasonably good practice, commands as good fees as any paid in Northwest Nebraska and numbers among his clients substantial persons and corporations, among whom are the Chicago Burlington & Quincy Railway Company, the Chicago Northwestern Railway Company, The International Harvester Company of America, the United States Fidelity and Guaranty Company, The Southern Surety Company, the State Guarantee Fund Commission of the State of Nebraska, the United States National Bank of Omaha, for all of whom Affiant transacts local business and as well the largest bank in the City of Chadron, Nebraska, and two neighboring towns, from who he commands reasonably good fees.

That the plaintiff is entitled to have a fee taxed in this court on the appeal, for his attorneys, in such sum as shall be reasonable under the provisions of the Nebraska statute cited in the motion.

Edwin D. Crites.

Subscribed in my presence and sworn to before me this 11th day of September, 1926. Frederick A. Crites, Justice of the Peace. (Notarial Seal.)

[File endorsement omitted.]

[fol. 55] Minute entry of argument and submission September 15, 1926, omitted in printing.

[fol. 56] In United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1926

No. 7314

National Surety Company, a Corporation, Plaintiff in Error,

vs.

Edwin B. Lyons, County Treasurer, etc., Defendant in Error

In Error to the District Court of the United States for the District of Nebraska

Mr. Rush C. Clarke and Mr. James G. Mothersead (Mr. R. T. York, and Mr. A. R. Honnold, were with them on the brief), for plaintiff in error.

Mr. E. D. Crites (Mr. F. A. Crites was with him on the brief), for defendant in error.

Before Lewis, Circuit Judge, and Munger and Faris, District Judges

Opinion—Filed December 20, 1926

Lewis, Circuit Judge, delivered the opinion of the court.

The First National Bank of Harrison, Nebraska, was appointed depository of funds belonging to Sioux County in that State; and as the State statute required, gave a bond with appellant as its surety, conditioned that the bank would keep all sums of money deposited with it by the treasurer of the county subject to his order and would pay the same over upon the written demand of said treasurer. The bond recited that the deposits should be subject to withdrawal by the county treasurer as the requirements of the county [fol. 57] might demand, and that the amount on deposit might be increased or decreased from time to time as the treasurer might determine. The depository became insolvent at a time when there was on deposit with it funds to the amount of $35,395.70, and the county treasurer thereupon brought this action on the bond against the surety and

asked judgment for damages in the full penal sum named in the bond ($30,000) and for a reasonable sum for plaintiff's counsel as attorney fees to be taxed as a part of the costs.

The answer alleged that the First National Bank of Harrison had an authorized capital of $50,000, that under the State statute the county treasurer was forbidden to make deposits in said bank in excess of fifty per cent of the paid up capital of the bank, that the statute made it criminal for him to exceed that limit and that appellant as surety was not liable in excess of that amount, to-wit: $25,000.

A jury was waived and the case submitted to the court on an agreed statement of facts, which were substantially as they were stated in the pleadings. The court gave judgment for plaintiff in the sum of $30,000, the full amount named in the bond, found that $3,000 was a reasonable allowance as a fee for plaintiff's attorney in the cause and taxed that sum as a part of the costs against the defendant. To this action of the court objections were made and exceptions properly saved. The case was then brought here on writ of error, and counsel presents two questions, each one of law, as claimed error:

(1) Whether the surety was liable on the depository bond in excess of fifty per cent of the paid-up capital stock of the bank—$25,000.

(2) Whether the plaintiff in the case (defendant in error here) was entitled to have an attorney's fee taxed as a part of the costs under the provisions of the Nebraska statute.

The first question is based on that part of Section 6193 Comp. Stat. Neb. 1922, which reads:

"The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half [fol. 58] of the amount of the bond of such bank, and the amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent of the paid up capital stock of such bank."

The statute makes three limitations on the maximum of deposits, the third being cumulative of the other two; and

they seem to be of equal importance. The statute also (sec. 6195) makes it a misdemeanor for the county treasurer to fail or refuse to do or perform any duty required of him by the statute. In view of the statute it is contended that the obligation of the surety on the bond was limited to $25,000, inasmuch as it was prohibited and made unlawful for the treasurer to have on deposit with the bank at any one time more than that sum; and it is claimed that the supreme court of the State has so construed the statute. If that be so we will, of course, follow the interpretation of the statute given to it by that court. It can hardly be said that the exact issue made in this case on the third limitation has been presented to that court, but it has considered this statute, the duties of the county treasurer under it and the obligation of a surety of the depository bank in several cases, and expressed its views on the purpose and effect of these limitations. In Cole v. Myers, — Neb. —, 160 N. W. 894, the controversy was between two sureties, one for the depository bank and one for the county treasurer on his official bond, who had made an over-deposit, the total being $13,189.61. The bank's bond was in the penal sum of $10,000. It failed and the surety on that bond promptly paid to the county $10,000 as the amount of its liability, and to that extent procured an assignment of the deposit. Later the surety on the county treasurer's official bond paid the county the balance of the deposit, $3,189.61, took an assignment of that claim and also obtained assignment of the claim for the whole $13,189.61, which the county treasurer had filed with the receiver of the bank. In considering the respective rights of the two sureties to share in a dividend paid by the receiver on the whole amount of the deposit the court, in referring to the rights of the surety on the depository bank's bond said, after quoting the statute:

"The statute is by construction a part of the depository bond. Blaco v. State, 58 Neb. 557, 78 N. W. 1056. In entering into the contract of suretyship the surety had a right to assume that the treasurer would comply with the statute and limit his deposit to $10,000. The bond was given to [fol. 59] protect legal deposits of county funds to the contractual and statutory maximum of $10,000 and not as security for an illegal deposit in excess of that sum."

The court further said in that case that the surety on the depository bond was not in any wise responsible for the wrongful act on the part of the county treasurer in making the excess deposit; and that the over-deposits were made in violation of law. That opinion was rendered in 1916. It will be noted that the court in that case said that the statute here relied upon is a part of the depository bond. We take that to be an announcement of the general principle that the law of the place where a contract is made becomes a part of the contract. That is, the contract is to be construed and its obligations determined according to the law of the place. 2 Williston on Contracts, sec. 516; Ogden v. Saunders, 12 Wheat. 212; Railroad Companies v. Schutte, 103 U. S. 118, 140; Tennessee Bond Cases, 114 U. S. 663, 688.

In Re State Treasurer's Settlement, — Neb. —, 70 N. W. 532, the controversy was between the outgoing and incoming State treasurers. The former had made deposits in some of the depository banks in excess of the statutory limitation, and the latter, among other contentions, seems to have insisted that in the settlement between them the full amount of those deposits should be delivered to him in currency. He doubted whether the surety could be held at all for any amount in such instances. In considering the extent of liability of such depositories and their sureties on the bonds which they had given the court said:

"The depository law has fixed the maximum sum which the treasurer shall have on deposit in any bank at the same time at one-half of the amount of the bond executed by the bank. This is a limitation, not only upon the power of the treasurer to deposit, but restricts the bank from demanding a larger sum than one-half of the penal sum named in the bond. Were it not for this limitation, unquestionably a depository bank and the sureties upon its bond would be liable (on the bond) in case of a breach of its conditions, to the extent of the full penalty written in the bond. If the treasurer exceeds his duty by depositing a larger sum in a depository bank than he is authorized by law to do, it does not affect the liability of such bank and the sureties on its bond to repay to the State the sum deposited therein, in

strict conformity to the requirements of the depository law, and the accretions thereof."

[fol. 60] In State ex rel. v. People's State Bank of Anselmo, — Neb. —, 196 N. W. 912, it appeared that the county treasurer of Custer County had on deposit with the depository bank $44,000. Its capital stock was $15,000 and it became insolvent. The State had by statute provided for the creation of a guaranty fund from which depositors in failed State banks should be paid the amount of their claims, and the question was whether that fund was liable for payment of the amount deposited in the bank by the county treasurer in excess of fifty per cent. of the capital stock of the bank. The Act providing for that fund was held to have repealed the requirement of the statute with which we are now dealing, insofar as it exacted bonds from State banks as depositories. The attorney general conceded that the guaranty fund was liable for $7,500 of the $44,000 deposit, being fifty per cent. of the capital stock of the bank. He contended, apparently, that the guaranty fund stood in the place of the surety of the State bank under the prior law, and that $36,500 of the deposit having been made in the bank by the treasurer unlawfully, the guaranty fund could not be held for it. The trial court allowed the full amount of the deposit, to be paid out of the guaranty fund by the receiver. This action was reversed. The supreme court said:

"We are of the view that the provisions of section 6193, limiting the amount which a county treasurer may legally deposit in a bank to 50 per cent. of its paid-up capital stock, is still obligatory on the treasurer. This limitation was made for, and serves, a good purpose. If, then, the limitation is still effective, it follows as a matter of course that the deposits made by the treasurer in the bank in excess of $7,500 were in violation of the express terms of the statute. The question then arises whether the guaranty fund is liable for the payment of the excess. The liability of the guaranty fund is somewhat analogous to the liability of a surety or guarantor":

and it was held that

"The treasurer having deposited the county funds in the bank in violation of precise terms of the law the excess so

deposited is not entitled to the protection afforded to depositors by the guaranty law."

There was a dissent by three of the seven Justices. A rehearing was granted and the opinion which we have just considered was vacated and the judgment below affirmed. But the second opinion, found in 198 N. W. 1018, is based [fol. 61] entirely on the court's construction of the guaranty fund statute. That statute contained this:

"No bank which has complied in full with all of the provisions of this article shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured."

The court said that the guaranty fund statute did not put a limitation on the amount that might be deposited by a county treasurer in a depository State bank, that there was no limitation on the amount of private funds that might be so deposited and that the Act disclosed a purpose to put the two on the same basis of protection. Nothing is said in the last opinion as to the extent of liability of a surety of a National bank depository under section 6193, to which situation the guaranty fund statute does not apply. Three of the Justices dissented, for the reasons stated in the first opinion; and those reasons and the conclusions therefrom were not rejected as unsound by the other Justices, if the premises on which they were based had been conceded to be tenable; that is, the guaranty fund as to such over-deposits was to be regarded as standing instead of a guaranty bond, under section 6193. From these decisions we think the unavoible conclusion is, that a surety is not liable for over-deposits made by a county treasurer in excess of any of the limitations fixed in section 6193. The bank is, of course, liable. It accepted the deposits and cannot be heard to say that they were made unlawfully. But the surety was not a party to those transactions. There is no evidence that it even knew of them. Neither the county treasurer nor the bank was its agent in those transactions.

The position taken by the supreme court of Nebraska in the cases that have been referred to is reasonable, just and based on sound principle. The Iowa supreme court, in

Fremont County v. Fremont County Bank, — Ia. —, 115 N. W. 925, and the Montana supreme court, in Yellowstone County v. First Trust & Savings Bank, — Mont. —, 128 Pac. 596, have expressed in substance the same views and conclusions. But on this question it is enough for us to know that the supreme court of the State has held that the limitation on deposits in section 6193 is to be read into the innocent surety's obligation.

[fol. 62] The contention on the second point is that the Nebraska statute classifies the fee to be allowed to plaintiff's counsel as costs, and directs that it be taxed as costs against the defendant; and that the supreme court of Nebraska, in construing this statute, holds that this fee is a part of the costs in the case, and not a part of defendant's contractual liability as such; and that the Federal statute makes provision for allowance of attorney- fees in civil cases, to be taxed as costs, and that Congress having legislated on the subject, the Federal court must apply the Federal statute to the exclusion of the State statute on the same subject. Taking up first the State statute, Comp. Stat. Neb. 1922, sec. 7811, it reads as follows:

"In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

This statute was considered by the State supreme court in Nye-Schneider-Fowler Co. v. Bridges-Hoye & Co., — Neb. —, 151 N. W. 942, and (on rehearing) — Neb. —, 155 N. W. 235. In that case the surety on a contractor's indemnity bond was sued on the bond on account of the principal's default, along with the principal. The trial court refused to allow to plaintiff an attorney's fee to be taxed as costs.

The statute under consideration was passed after the contract and bond were entered into, and the surety contended that because of that fact compensation to plaintiff's counsel as attorney's fee in the case could not be taxed against the surety. The supreme court in it first opinion acceded to this contention and affirmed the ruling of the trial court. On reargument it reached a contrary conclusion, reversed the action of the trial court and directed that a reasonable allowance be made as a fee to the plaintiff's attorney and that it be taxed as part of the costs. It held that the statute applied to contracts and obligations entered into prior to the passage of the statute as well as to those made thereafter. The court in reaching its final conclusion adhered [fol. 63] strictly to the terms of the statute which made the attorney's fee a part of the costs in the case, to be taxed as such, and said that this related only to the remedy and did not create and add to the contractual liability of the defendant nor in any way change the contract or the liability thereon. This ruling was followed in Ward v. Bankers' Life Ins. Co., — Neb. —, 157 N. W. 1017, and in Reed v. American Bonding Co., — Neb. —, 166 N. W. 196. In the Reed case it appeared that the contract of insurance sued on was made before the statute was enacted, and it was insisted by defendant that to apply the statute in such a case would result in an impairment of the obligation of the contract. The court said the point had been fully considered in prior cases and that

"The decisions in these cases are based upon the proposition that the statute affects the remedy only, and to change the taxation of costs, even if it results in increasing the amount of costs, does not change the liability provided for in the contract, but only affects the method of enforcing that liability. If the contract is complied with, no costs are taxed against the company. If litigation becomes necessary to determine the liability, the costs result from the litigation, and not from any construction of the contract."

This, then, is not a statute affecting the contractual rights and liability of defendant, but one on the subject of costs only.

We turn to the Federal statute on the same subject. R. S. Secs. 823, 824 (U. S. Comp. Stat. Secs. 1375, 1378.) The first of these sections provides:

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States. * * * But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

The second section fixes the amounts to be respectively taxed. As to fees of attorneys:

"In cases at law, when judgment is rendered without a jury, ten dollars."

[fol. 64] This statute was originally enacted February 26, 1853 (10 Stat. 161), and the two sections, as we now have them in the revision, were included in one section.

It is the general rule that where Congress has not regulated the subject of costs, the Federal courts will follow the State statutes on the subject and award to the parties the costs to which they would be entitled if the litigation were in the State court where the Federal court is sitting. Seatcherd v. Love, 166 Fed. 53; Shreve v. Cheesman, 69 Fed. 785. This rule is in recognition of the provisions of R. S. Sec. 721 (U. S. Comp. Stat. Sec. 1538), which reads:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In The Baltimore, 8 Wall. 377, it was held that under the Act of February 26, 1853, attorneys, solicitors, and proctors might charge their clients reasonably for their services in addition to the taxable costs, "but nothing can be taxed as cost- against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated." In United States v. Sanborn, 135 U. S. 271, 282, the court said:

"The whole subject of fees in the courts of the United States is regulated by chapter 16, title 'Judiciary' of the

Revised Statutes. By section 823 it is provided that the fees allowed in that chapter and no other 'compensation' shall be taxed and allowed in the courts of the United States, to the officers therein named and to witnesses, except in cases otherwise expressly provided by law; leaving attorneys, solicitors, and proctors to charge and receive from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or as may be agreed upon between the two parties."

In Ex parte Peterson, 253 U. S. 300, the right to tax allowances for the services of an auditor appointed in a law case was under consideration. The court said that the Act of February 26, 1853, did not deal expressly or by implication with the subject of taxing as costs expenses of an auditor, and inasmuch as there was no Federal statute regulating the subject, the rule and practice prevailing in the [fol. 65] State court might be followed. See also Day v. Woodworth, 13 How. 362; In re Paschal, 10 Wall. 483; Flanders v. Tweed, 15 Wall. 450; Trustees v. Greenough, 105 U. S. 527; United States v. Waters, 133 U. S. 208, 212; Michigan Aluminum Foundry Co. v. Aluminum Co. of America, 190 Fed. 903.

Counsel for defendant in error relies upon Williamson v. Liverpool & London & Globe Ins. Co., 141 Fed. 54, and Spring Garden Ins. Co. v. Amusement Syndicate Co., 178 Fed. 519, in each of which the plaintiff below was permitted to recover an allowance as an attorney's fee against the defendant. In the Williamson case the State statute did not allow the recovery, so far as the opinion discloses, as a part of the costs to be taxed in the case, but it provided that such a fee might be recovered in event the insurer vexatiously refused to pay in accordance with its obligations. This is compensatory damages. In the Spring Garden Insurance Company case the Kansas statute did provide that the attorney's fee was to be recovered as a part of the costs. But that was a suit in equity, and sections 823 and 824 were not controlling.

For the reasons stated we think both points were well taken and the court erred in law in not sustaining them.

The judgment was excessive and attorney's fees cannot be taxed against defendant. Reversed with direction to set aside the judgment and vacate the order taxing plaintiff's attorney's fees against defendant as a part of the costs and that the court proceed to dispose of the case in accordance with the views herein expressed.

[fol. 66] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Judgment—December 20, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the National Surety Company, a corporation, have and recover against Edwin B. Lyon, County Treasurer of the County of Sioux, the sum of One Hundred Thirty-one and no/100 Dollars, for its costs in this behalf expended, to be collected according to law.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to set aside the judgment and vacate the order taxing plaintiff's attorney's fees against defendant as a part of the costs and to proceed to dispose of the case in accordance with the views expressed in the opinion of this Court.

December 20, 1926.

[fol. 67] In United States Circuit Court of Appeals, Eighth Circuit

Clerk's Certificate

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that

the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the National Surety Company, a Corporation, was Plaintiff in Error and Edwin B. Lyons, County Treasurer of the County of Sioux, was Defendant in Error, No. 7314, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-fourth day of February, A. D. 1927, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Nebraska.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at — office in the City of St. Louis, Missouri, this seventh day of March, A. D. 1927.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 68] Supreme Court of the United States

Order Allowing Certiorari—Filed April 25, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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PETITION

STATEMENT OF FACTS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, the people of Sioux County, Nebraska, through its Board of Commissioners, and at the request of the First National Bank of Harrison, in that state, designated said bank as a depositary of county funds upon certain conditions, among which was the execution of a satisfactory bond. Accordingly, on December 12, 1922, said bank as principal and the Respondent as surety executed a bond reciting that they

> "are held and firmly bound unto the people of the County of Sioux in the State of Nebraska, in the just and full sum of Thirty Thousand and no/100 . . . Dollars * * * the amount whereof shall be subject to withdrawal or diminution by said County Treasurer, as the requirements of said County shall demand, and *which amount may be increased or decreased as the said Treasurer may determine*" (R. 3, 4).

In consideration for its undertaking Respondent received premiums based on the full amount therein stated and, in reliance thereon, the County, through its Treasurer, deposited funds in said bank to an amount equal to said sum and more. Said bond was meanwhile filed with the said Board of Commissioners and their approval invoked. Some fourteen months later an official examination of said bank disclosed that it had become insolvent and on February 12, 1924, a receiver was appointed and Petitioner was obliged to call upon Respondent to perform its undertaking. Although no ques-

tion was ever seriously raised as to its liability for five-sixths of the deposit, Respondent refused to pay without suit and on October 7, 1924, an action on the bond was begun in the State Court for Sioux County, against the Respondent, which, one month later, filed a petition and bond and caused the action to be removed to the United States Court for the district of Nebraska. Petitioner there filed an amended petition, much of which was admitted in the answer, (R. 24), praying recovery of the full amount of the bond and also "a reasonable sum as the plaintiff's attorney fee" by virtue of Neb. Comp. Stats. 1922, sec. 7811, providing that in actions upon such bonds "the court, upon rendering judgment * * * shall allow the plaintiff a reasonable sum as an attorney's fee," etc. The answer raised as the sole defense the claim that because another statute (sec. 6193) forbade a county treasurer to deposit an amount exceeding 50 per cent of the capital stock of the bank, and because the principal's capital stock was limited to $50,000, Respondent was not liable; and it prayed dismissal with costs. Upon a trial to the court, after waiver of a jury, judgment was rendered for the full amount of the bond and also for an attorney's fee of $3,000, or 10 per cent of the recovery. Upon Writ of Error, the Eighth Circuit Court of Appeals, on December 20, 1926, reversed the judgment, absolving Respondent from all sums above $25,000 and from all attorney's fees under the statute. (16 Fed. (2nd) 688.) Petitioner submits that said judgment of reversal is erroneous and contrary to law for the following reasons:

(I) *The lower court misinterpreted the Nebraska decisions and based its ruling upon dicta which have been overruled.* (*pp. 5 to 8 infra.*)

(II) *The lower court erred in treating Neb. Comp. Stats. Sec. 6193 as "a part of the surety's obligation" while excluding therefrom sec. 7811 requiring "a reasonable attorney's fee to be taxed."* (*pp. 8 to 9 infra.*)

(III) *The lower court's decision conflicts with other Federal decisions on both points.* (*pp. 9 to 13 infra.*)

(IV) *The lower court erred in holding Rev. Stats. Secs. 823 and 824 exclusive in causes removed from a state court; and that point should be affirmatively settled by this court.* (*pp. 13 to 15 infra.*)

WHEREFORE, Petitioner prays the allowance of a writ of *certiorari* to the Court of Appeals of the Eighth Circuit in said cause No. 7314 (*National Surety Company,* a Corporation, plaintiff in error, v. *Edwin B. Lyons,* County Treasurer, etc., defendant in error); that said cause may be reviewed and determined by this court and that the judgment of said Court of Appeals be vacated and that of said district court reinstated and for such other and further relief as may be just, equitable and proper.

CHARLES S. LOBINGIER, *of Counsel.*

EDWIN D. CRITES, *Attorney for Petitioner.*

Certificate of Counsel

We hereby certify that the foregoing petition is, in our judgment, well founded and is not interposed for delay.

CHARLES S. LOBINGIER, *Of Counsel.*

EDWIN D. CRITES, *Attorney for Petitioner.*

BRIEF

I

The Lower Court Misinterpreted the Nebraska Decisions and Based Its Ruling Upon Dicta Which Have Been Overruled.

At the very outset of its discussion of the first branch of the case the lower court says (R. 56):

> "It is claimed that the Supreme Court of the state has so construed the statute. If that be so we will of course follow the interpretation given it by that court."

Evidently "that" was found to "be so" for the lower court closes its discussion thereof by declaring (R. 59):

> "From these *decisions* (*sic*) we think the unavoidable conclusion is that a surety is not liable for over-deposits made by a county treasurer in excess of any of the limitations."

Now the truth is that there are no such "decisions" and that the lower court recognizes this at the very beginning by conceding (R. 56):

> "It can hardly be said that the exact issue made in this case on the third limitation *has been presented to that court.*"

Well since "the exact issue has (*not*) been presented" nothing that the state court may have said about it is binding on this or any other Federal Court.

> "To make it so," said this court in *Carroll* v. *Carroll*, 16 How. 287, "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties * * * and therefore this court and other courts, organized under the common law, has

> never held itself bound *by any part of any opinion,* in any case, *which was not needful to the ascertainment of the right or title in question.*" (Italics ours.)

For the rule is well established that the Federal Courts will not follow the *dicta* of state courts but only their decisions (*Carroll* v. *Carroll,* 16 How. 275, 287; *St. Louis R. Co.* v. *R. Co.,* 145 U. S. 393, 403; *Pollock* v. *Farmer's Loan & Trust Co.,* 157 U. S. 429, 575; *Central R. Co.* v. *Wright,* 164 U. S. 327, 332, 333). This court is not even bound by its own expressions regarding points not involved in the particular case before it. (*Cohens* v. *Virginia,* 6 Wheat, 399; *McCormick Machine Co.* v. *C. Aultman,* 169 U. S. 606, 611; *U. S.* v. *Wong Kim Ark,* 169 U. S. 678, 679; *Bardes* v. *Bank,* 178 U. S. 534; *Bryan* v. *Bernheimer,* 181 U. S. 197; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 291).

None of the Nebraska cases which the lower court cites really approaches the question here involved except *State People's State Bank,* 111 Neb. 136, 198 N. W. 1018 and that has recently been interpreted by the Nebraska Supreme Court in a sense exactly opposite to the lower court's interpretation. For that Supreme Court has now rendered a *decision* on this question. In *Scott's Bluff County* v. *First Nat. Bank,** March 1, 1927, that court had this identical question which it disposed of as follows:

> "This is an action by the county of Scott's Bluff and its county treasurer, Schmidt, to recover from the First Na-

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* Unreported as yet, but a certified copy filed with the Clerk of this Court.

tional Bank of Gering and from Globe Indemnity Company, hereinafter called the Company, the sum of $5,000 and accrued interest on a certain bond for that sum executed by those defendants to secure deposits of county funds. Trial to the court resulted in a judgment against defendants for the full amount and they appealed.

"The bank had a paid-up capital of $25,000. To secure deposits it had given surety bonds, including that of the Company, for a total sum of $57,500. * * * The county deposits of record on the books of the bank were $55,892.66, without including the Barton check of $1,274.48. The total of these two items is $57,167.14; but contractual interest at 3% on the daily balances increased the total deposits to $57,500 or more, if the Barton check be considered as a deposit. The other surety companies paid the face of their bonds, $52,500, and suit was brought against the Company for the full amount of $5,000 on the theory that the county deposits totaled $57,500 or more when the bank closed.

"The Company argues, inasmuch as section 6193, Comp. St. 1922, prohibited the treasurer having deposit with the bank a sum exceeding 50% of the $25,000 paid-up capital of the bank, that the Company is liable with all the other bonding companies for only its *pro rata* share of $12,500. Questions akin to this have been before this court and a contrary principle has been followed. For examples: Notwithstanding section 6193, when a county treasurer deposits public funds in a state bank in excess of 50% of the paid-up capital stock of the bank it was held, in *State* v. *People's State Bank*, 111 Neb. 136, that the entire deposit was within the protection of the depositors' guaranty fund. Where a contract by a state bank to borrow money in excess of the debt limit authorized by its charter has been performed by the lending of money to such state bank, it will not be allowed to avoid the payment of its notes. *State* v. *Farmers State Bank*, 112 Neb. 597. And while the law prohibits a state bank from making loans in excess of a certain percentage of its paid-up capital stock and surplus, yet such loans are frequently made and their payment has always been enforced by this court when suit has been brought upon the notes. *State* v. *People's State Bank*, 111 Neb. 136. We adopt the same principle here. *The bank could not defend a suit by the county to enforce its claim to deposits on the ground*

that they exceeded the statutory percentage of the bank's capital. It necessarily follows that the surety could not assert such a defense, for the engagement of the surety was to pay deposits of the county in the bank, if its principal failed to do so." (Italics ours.)

II

The Lower Court Erred in Treating Neb. Comp. Stats. Sec. 6193 as "a Part of the Surety's obligation" while excluding therefrom Sec. 7811 requiring "a Reasonable Attorney's Fee to Be Taxed"

It is a poor rule that will not work both ways; but the lower court worked only one way the rule which it stressed (R. 56, 57) as found in *Cole* v. *Myers,* 100 Neb. 484, 160 N. W. 894, viz. that "the statute is by construction a *part* of the depository bond." That case, is not, in view of *Scott's Bluff County* v. *First Nat. Bank,* just quoted, an authority for the lower court's conclusion; but *Cole* v. *Myers* was not expressly overruled and its doctrine must be applied here so far as it is applicable at all. The astonishing feature of the lower court's opinion is its application of the doctrine to the statute limiting the treasurer's deposits while ignoring the doctrine's obviously greater applicability to the statute requiring the taxation of "a reasonable attorney's fee." For the language of the latter is mandatory and leaves no alternative: "In *all cases* * * * the court, upon rendering judgment * * * *shall* allow the plaintiff a reasonable * * * attorney's fee." (Sec. 7811.) Since

that provision is "a part of the depository bond," why did not the lower court apply it? If it had done so it would not have fallen into the error of so misconstruing the Nebraska cases which it cites as to declare (R. 61) that "This then is not a statute affecting the contractual rights and liability, but one on the subject of costs only." This in the face of the declaration applied to the first point that "the statute is by construction a part of the depository bond" and "is to be read into the innocent surety's obligation"! (R. 56, 59). How can the statute be so "read" without "affecting the contractual rights" of the surety? If the lower court had been consistent and carried its own doctrines to their logical conclusion, it would have upheld the district court in obeying the mandatory statute of the state and allowing the reasonable fee which by its contract the surety had undertaken to pay.

III

The Lower Court's Decision Conflicts With Other Federal Decisions on Both Points:

(1) *As to the Limit of the Bond*

In *Cheyenne* v. *Md. Casualty Co.*, 13 Fed. (2nd) 401 a similar contention was rejected under a Wyoming Statute limiting the treasurer's deposits to 90 per cent of the bond's penalty. The court followed *Gregg* v. *Hinkle*, 29 N. M. 576 to the effect that such a provision

> "Does not create a limitation of the surety but is a police regulation, directed to the officer as an additional element of safety, in order that not only the principal but any accretions may be fully insured."

This in fact is the prevailing rule in the state courts (*State* v. *Pederson,* 135 Wis. 31, 114 N. W. 826 (per Winslow C. J., citing *Hart* v. *State,* 95 U. S. 316); *State* v. *Fidelity & Guaranty Co.,* 81 Kan. 660, 106 Pac. 1040) and the two cases which the lower court cites (R. 59) on this point in no way conflict with the above. Thus the lower court decided an important question of general law against the weight of authority.

In *National Surety Co.* v. *Le Flore County,* 262 Fed. 325 the bank's surety sought release because the bank had not been legally named as a depository. But the Fifth Circuit Court of Appeals, while admitting such to be the case, declared that the surety could

> "not assert as against the county the invalidity of the appointment of the depositary and of the fidelity bond; this not merely because the bond recited the appointment, but because by reason of the execution of it and its delivery to the county in consideration of a premium paid to the appellant, the loss of the funds deposited was brought about."

The court quoted copiously from Marshall C. J. in *U. S.* v. *Maurice,* 2 Brock. 96, 26 Fed. Cas. 1211.

(2) *As to the Attorney's Fee*

In *New Amsterdam Casualty Co.* v. *Shields,* 155 Fed. 54, the Sixth Circuit Court of Appeals, in an opinion concurred in by Lurton J., in an action on an insurance policy upheld an allowance, under the local statute of an attorney's fee of 20 per cent of the amount recovered. And as was said in *Nat. Surety Co.* v. *McCormick,* 268 Fed. 185, involving this same surety's obligation:

> **"This is not that ordinary contract of voluntary suretyship as to which there has arisen a sort of tenderness toward sureties. This is a contract of insurance, entered into by the surety for the revenue which it derives from the business of suretyship and in this relation the obligation should be treated as other insurance contracts which are usually construed most strongly against the insurer." (Citing many cases.)**

The lower court's decision on the second question likewise conflicts with its own prior decisions. It now seeks to distinguish *Spring Garden Ins. Co.* v. *Amusement Co.,* 178 Fed. 519 by saying (R. 63) that it "was a suit in equity and sec. 823 and 824 were not controlling." Why not? Sec. 823 expressly mentions "solicitors" who appear only in equity causes while sec. 824 expressly provides what the fee shall be "on a final hearing in equity." If a case in equity involves a fund in the court's custody a chancellor might have more discretion in distributing it than a common law judge. But such was not the situation in the case last cited. In fact the costs were there awarded in actions at law and the complaint was "that the court erred in decreeing that the insurance companies pay the costs in the actions at law" (178 Fed. 534). Indeed, one of the court's main grounds for allowing costs was that "the actions at law were properly brought" (Id.). More than that the actions, though equitable in form (as to pleadings), were treated and tried as actions at law and the court expressly said "that an action such as this is an action at law without any equitable features" (Id. 536) citing *Mechanics' Ins. Co.* v. *Distilling Co.,* 173 Fed. 888.)

The lower court's decision also conflicts with *Williamson* v. *Ins. Co.* 141 Fed. 54, which it seeks to distinguish on the alleged ground that sec. 8012 of the Missouri Statutes (1899) there applied, "did not allow recovery [of an attorney's fee] as a part of the costs." But how else could it be allowed? The Missouri statute provides, as does that of Nebraska, for "a reasonable attorney's fee"; and the fact that the word "costs" is not expressly used does not change their character. For, as declared in the first case cited by the lower court on this question:

> "The fact that the allowance of attorney's fees and taxing them as costs in the case depended on their being an express provision in the contract for their allowance, would not change the nature of the allowance." (*Nye-Schneider-Fowler Co.* v. *Bridge, Hoye & Co.*, 98 Neb. 863, 867.)

This decision then cites *Security Co.* v. *Eyer*, 36 Neb. 507, where it is observed:

> "Attorney's fees in States where they are allowed by the court to the successful party are *in the nature of costs and are taxed and treated as such. They are no part of the judgment proper.*"

So in *Doe* v. *Manchester*, 12 C. B. 474, 74 E. C. L. 474, 138 Reprint, 992, a statute allowing "full costs and expenses" was held to include attorney's fees. When, therefore, the Eighth Circuit Court of Appeals upheld the allowance of an attorney's fee in *Williamson* v. *Ins. Co.* 141 Fed. 54, it was meant to be taxed as a part of the costs and the lower court's classification of them as "compensatory damages" is without foundation or precedent so

far as we have been able to find. In substance the case last cited is no different from this. In both, a state statute provided an attorney's fee which, in the cited case the court awarded despite Rev. Stats. Secs. 823 and 824.

IV

The Lower Court Erred in Holding Rev. Stats. Secs. 823 and 824 Exclusive in Causes Removed from a State Court; and That Point Should Be Affirmatively Settled by This Court.

All of the cases which the lower court cites in support of its theory that these provisions are exclusive, were ordinary cases begun in a Federal court, involving no special circumstances or equities and calling for no exercise of judicial discretion. Under such conditions sections 823 and 824 were naturally applied. But this court has never held them exclusive under other conditions. Among the numerous cases in which it has approved the allowance of attorney's fees far in excess of the statutory limit, are *Fowler* v. *Trust Co.*, 141 U. S. 411 (5 per cent of amount involved); *Dodge* v. *Tulleys*, 144 U. S. 451, 457 ($500 allowed contrary to state decisions); *Harrison* v. *Perea*, 168 U. S. 311, 317 the court saying (325) "the amount was within the judicial discretion."

It is true that these were equitable proceedings; but the allowance was not placed on that ground. In the first case, e. g., it was made because the contract so provided and it was not found unreasonable. Yet surely the statute of a state, not merely

authorizing but *requiring* "a reasonable * * * attorney's fee," should not be given less force than a private contract. Moreover, as we have already seen, Sec. 824 is as mandatory "in equity or admiralty" as "in cases at law."

But not all the cases where attorney's fees were allowed in excess of the limit in sec. 824 were in equity. *Ex parte Jaffray,* 1 Lowell, 321, 13 Fed. Cas. 284, was a bankruptcy, not an equity, proceeding, and the same was true of *Randolph* v. *Scruggs,* 190 U. S. 533. In the former the court conceded that "the fee bill of Feb. 26, 1853 [now secs. 823 and 824] does appear to be intended to cover the whole ground of taxation of costs at law in equity and admiralty"; but "upon reflection" it "concluded that the fee bill is probably intended to reach only taxable costs, commonly so called"; in other words the ordinary case. "The strong equities of the petitioners' case" there led the court to allow substantial fees of two counsel for the same party. Yet "the equities" were no stronger than here, where the people of an entire country were obliged to sue for a sum, five-sixths of which were conceded to be due and all of which was included under the surety's express obligation. Had the cause remained in the court where it was brought the people would have been allowed "a reasonable * * * attorney's fee"; for the statute is mandatory. Yet because the surety, against the people's desire, effected the removal of the cause to another court, the people are not only put to

much greater expense in enforcing their just claim, but are deprived of their statutory right to reimbursement and the surety evades the requirements of the statute in contemplation of which it contracted. Moveover, a Nebraska statute of that very same import had been upheld by this court in *Farmers' etc. Ins. Co.* v. *Dobney,* 189 U. S. 301 and the evident purpose of removing the cause was to evade the effect of that decision and the statute which came within its terms.

Now the Eighth Circuit Court of Appeals had before it a very similar situation in *Spring Garden Ins. Co.* v. *Amusement Co.,* 178 Fed. 519. The insured had commenced ten actions on insurance policies in the state court and the insurers caused the removal of five to the Federal Court, which heard the whole controversy as one at law (though equitable in form) rendered judgment for the insured and over the insurers' objection taxed the attorneys' fees provided by the state statute because

> "Had the actions proceeded to judgment (i. e., in the state court) the costs would have followed the judgment; and the insurance companies will not be permitted to evade the costs by simply appealing to a court of equity."

So here, the surety should not be permitted to evade the terms of a valid statute by simply removing the cause. No case has been cited, and we have found none after extensive search, where such a course was permitted. The decision last cited was conclusive on the lower court and its attempted distinction as an equity case we have seen to be

groundless. In *Central R. Co.* v. *Pettus*, 113 U. S. 116, this court allowed counsel fees to the extent of 5 per cent of the amount involved in a case which had been removed from the state court and it should now affirmatively decide that the costs prescribed by a state statute can not be evaded by the party who effects removal.

In conclusion we respectfully submit that the Eighth Circuit Court of Appeals erred in its findings and judgment, causing great loss and hardship to the people of Sioux County, and confusion in the jurisprudence of the Federal Courts, and that a writ of *certiorari* should be issued as prayed.

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Of Counsel.

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May It Please the Court:

A most unusual situation confronts the court in this case. The lower court based its decision on two propositions (R. 47). The first, in which the lower court assumed to follow the state court, was soon afterward repudiated by the latter (*Scott's Bluff County* v. *First National Bank,* 212 N. W. 617). The second proposition has now been repudiated by the lower court itself which, about three months after deciding the case at bar, decided *Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d.) 223, in accordance with petitioners' contention here. Moreover this court has virtually decided the second question by denying writs of *certiorari* in *Globe Indemnity Co.* v. *Sulpho-Saline Co.,* 266 U. S. 606, and *Hartford Fire Ins. Co.* v. *Fertilizer Co.,* 268 U. S. 704, in each of which the attorney's fee here claimed had been allowed. Little, it would seem, remains for petitioners more than to supplement their original brief, upon which they rely, by indicating the bearing of these later decisions and discussing the single new question which arises concerning attorney's fees in this court.

I.

(Supplementing Original Brief II, 8, 9)

THE DOCTRINE OF *COLE* V. *MYERS,* 160 N. W. 894, THAT "THE STATUTE IS, BY CONSTRUCTION, A PART OF THE DEPOSITORY BOND," IS THE LAW NOT ALONE OF NEBRASKA BUT OF THIS FORUM AND MUST BE APPLIED HERE.

That doctrine is in no way affected by the cases which the lower court cites (folio 62, 63). In all of them the contract was made *before* the enactment of the statute and it could not have become part of the bond. Necessarily, then, the question arising there was not presented, and could not have been decided, in those cases. Nevertheless it is well to note how the Nebraska Court has handled the question which *was* presented. In the first case cited, *Nye-Schneider Co.* v. *Bridges,* 151 N. W. 942, the court treated the provision for attorney fees as contractual, saying:

> "It seems clear that the Legislature, by the Act of 1913, did not intend to impair *the obligations of existing contracts.*"

Even on rehearing the court allowed the fees only because it felt itself foreclosed by prior decisions which affect in no way the point here involved.

> "If the question we are considering was now presented for the first time," it declared (155

> N. W. 236), "we would hesitate to say that this statute does not create and *add to the contract a legal liability.*"

In the second case, *Ward* v. *Bankers' Life Ins. Co.*, 157 N. W. 1017, there was no discussion of the question; fees were allowed on the authority of the case last cited. In the third case, *Reed* v. *Bonding Co.*, 166 N. W. 196, the court declared that—

> "The reasons advanced for this contention (that the provision impairs the obligation of the contract) * * * and the manner in which they are presented in this brief, might well cause us to hesitate if the question was an open one."

Now these are all of the cases upon which the lower court based its conclusion (Tr. fol. 63) that the statute requiring attorney's fees to be taxed is not one "affecting the contractual rights and liability of the defendant." In not one of these cases was the doctrine of *Cole* v. *Myers*, 160 N. W. 894, questioned, and it seems clear that if the statute had antedated the contracts, it would have been treated as part of them. And even as those contracts were, the Nebraska court, as now constituted, evidently considers the provision for fees a contractual one and only with the greatest reluctance tolerates any other view.

Again, even if the provision is treated as pertaining to the remedy the liability is nevertheless contractual; for the parties may contract that a particular remedy be applied just as they may con-

tract that their obligations be enforced in a particular forum or according to the laws of a particular jurisdiction (9 Cyc. 665). When, under the doctrine of *Cole* v. *Myers, supra,* the statute in question became "a part of the depository bond" respondent thereby contracted to pay the fee therein prescribed. Its liability for such payment is, therefore, contractual. It would be a strange anomaly, indeed, if such a liability could be escaped because the court, in construing contracts made before the statute, and of which it could not possibly have formed a part, reluctantly followed cases which speak of it as pertaining to the remedy. Surely statutes cannot be evaded in that way.

That the statute was intended to impose a contractual liability is clear from its legislative history. It was originally enacted in 1913 when, under the doctrine of *Globe Pub. Co.* v. *State Bank,* 41 Neb. 175, and *Gulf, etc., R. Co.* v. *Ellis,* 165 U. S. 150, all Nebraska statutes of this character were classified as either contractual or penal. The legislature was careful so to frame the act that it would not be penal. As noted by the lower court in its latest decision on the question, "the lawmakers in enacting this statute evidently intended to meet the ruling in *Ry. Co.* v. *Ellis,* 165 U. S. 150. * * * To avoid the ruling in the *Ellis case* it was provided that the attorney's allowance be taxed as costs *instead of having it declared a penalty." (Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d) 223.)

Such was the legislative intent as found by the

lower court which pertinently added: "It is the duty of the court to give effect to the intent of the lawmakers."

"The purpose of the statute," said the state court in *Gipson* v. *Ins. Co.,* 199 N. W. 542, "was to allow an attorney's fee to a *successful* plaintiff in the class of cases * * * where resort to law was reasonably necessary to secure his rights."

"The taxing of an attorney's fee does not increase such liability" (*Swisher* v. *Fidelity Co.,* 113 Neb. 595). By avoiding the imposition of a penalty, therefore, the legislature placed the statute in the only other class—contractual.

"It is not correct," said this court in *M. K. & T. R. Co.* v. *Cade,* 233 U. S. 651, "to consider this [such a] statute as imposing a penalty" (Cf. *M. K. & T. R. Co.* v. *Harris,* 234 U. S. 421; *C. & N. W. R. Co.* v. *Nye Co.,* 260 U. S. 39; *Smith* v. *R. Co.,* 99 Neb. 719; *Marsh* v. *R. Co.,* 103 Neb. 654).

For we are not restricted to Nebraska law on this question. Indeed even the lower court found the doctrine of *Cole* v. *Myers* to be a general, and not merely a local one, saying:

> "It will be noted that the court in that case said that the statute here relied upon is a part of the depository bond. We take that to be an announcement of the general principle that the law of the place where a contract is made becomes a part of the contract. That is, the contract is to be construed and its obligations determined, according to the law of the place. *2 Williston on Contracts,* sec. 516; *Ogden* v.

Saunders, 12 Wheat. 212; *Railroad Companies* v. *Schutte,* 103 U. S. 118, 140; *Tennessee Bond Cases,* 114 U. S. 663, 688." (Tr. 49).

But more applicable than any of those last cited is *Hawthorne* v. *Calef.,* 2 Wall. 10, where this court held that a state statute rendering stockholders personally liable, to the extent of their shares, for corporate debts, entered so far into contracts of those dealing with the corporation, that the liability could not be removed by repeal of the statute. In so holding this court reversed a judgment of the Maine Supreme Court, which held that the liability was not contractual, and it thus demonstrated that, in determining the nature of such liability, this court would act independently and would not follow the state court as if it were merely construing the terms of a statute. Respondent saw fit to remove the cause to this forum and thereby submitted itself to the jurisprudence prevailing here as to the nature of its liability, which this court has pronounced contractual; for there is no difference on that point between the nature of the statutory liability here and that construed in *Hawthorne* v. *Calef.* Both entered the contract in exactly the same way—by incorporating the statute therein.

It is clear, then, that Respondent's undertaking included the payment of "a reasonable sum as an attorney's fee" in case of suit and that such undertaking is none the less contractual because it is enforced under the guise of awarding "costs." For

the nature of one's liability is determined by the *manner in which it was incurred*—not by the words used in the judgment enforcing it. Here the liability was incurred by Respondent's voluntary execution of the bond of which the statute fixing the attorney's fee was a part. The essential and contractual nature of such liability cannot be changed by a mere direction that, in the judgment of enforcement, it be "taxed as part of the costs. That phrase would, if necessary, be treated as legislative surplusage; but it is not necessary because the phrase changes nothing. The entire liability is enforced in the same judgment. The designation of a part thereof as "costs" has no effect upon the contractual nature of the liability. And, it is hardly necessary to add, that nature is not changed by bringing the cause into this forum. Whatever the Nebraska court may have thought about it, such liability is contractual here and Petitioners' corresponding right is likewise contractual. It follows that such right must be enforced here in some form regardless of whether Rev. Stats. secs. 823, 824 include it. For, as was well said by the lower court in a later case than that at bar:

> "This act was not intended to make such allowances ordinary costs as are fees of court officers or attorney's docket fees. Such allowances are made to plaintiff and not to the counsel" (citing *Stuart* v. *Boulware,* 133 U. S. 78) *Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d.) 223).

II

(Supplementing Original Brief IV, 13-16)

A reversal of the lower court's ruling as to the attorney's fee is indispensable in order to keep that court consistent with itself. We have seen how it allowed such fees in 178 Fed. 519. It has done so since in several instances, one of them *after* its decision in this case. In *Globe Indemnity Co.* v. *Sulpho-Saline Co.,* 299 Fed. 219, the same trial judge allowed attorneys' fees under this identical statute, the Court of Appeals (lower court here) upheld the allowance and this court denied a writ of *certiorari* (266 U. S. 606).

Again in *Business Men's Assur. Co.* v. *Campbell,* 18 Fed. (2d) 223, the same trial judge allowed an attorney's fee under the same statute. The same objection (upheld in this case) was presented to the lower (appeals) court and rejected in the case last cited. Now what is the district judge to do who finds his rulings receiving conflicting treatment in the Court of Appeals? Necessarily he must look to this Court.

So the Fifth Circuit Court of Appeals has recently upheld an allowance by the district court, under a state statute similar to this, of an attorney's fee of 10 per cent in an action on an insurance policy (*Hartford Fire Ins. Co.* v. *Fertilizer Co.,* 4 Fed. (2d) 835) and this court approved the ruling by denying a petition for a writ of *certiorari* (268 U. S. 704).

III.

PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES IN THE APPELLATE PROCEEDINGS.

As originally enacted the section now constituting Neb. Comp. Stats. sec. 7811, provided in general terms for "a reasonable sum as an attorney's fee" (Neb. Sess. Laws, 1913, p. 738) and the state court held that this was taxable in the trial court only (*Kaneft* v. *Ass'n*, 102 Neb. 92). Recognizing the inadequacy of a provision which left the insured thus unprotected in appellate proceedings where the expense is often as great, or greater, than in the trial court, the Legislature, in the year following the decision last cited, passed this amendment which now forms the last part of Sec. 7811:

> "If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings" (Neb. Sess. Laws, 1919, Sec. 604).

There can be no doubt then as to the legislative intent; the statute is mandatory (*O'Shea* v. *Hotel Co.*, 109 Neb. 317, 334); and the sole question is whether respondent can evade it merely by removing the cause to this forum after executing the bond in question with full knowledge that the statutory amendment above quoted became a part of said bond. The state court has regularly enforced the amendment (*Cent. Neb. Co.* v. *Olson*,

111 Neb. 402; *Swisher* v. *Fidelity Co.*, 113 Neb. 595).

And where the trial court fails to allow such fees, the appellate court will tax them for both (*Nye-Schneider-Fowler Co.* v. *Bridges*, 98 Neb. 868). An exception is made where the insurer succeeds on the appeal (*O'Shea* v. *Hotel Co.*, 111 Neb. 584) and this removes the statute from the inhibition of *C. & N. W. R. Co.* v. *Nye-Schneider-Fowler Co.*, 260 U. S. 35, where this court said (p. 46) that the state court's interpretation "controls our view" (Cf. *M. K. & T. R.* v. *Harris*, 234 U. S. 416).

Hence in this case if the lower court had *properly* reversed the district court's judgment, no attorney's fee would have been taxable in the court *a quo;* but since that reversal was erroneous (as shown by its decision three months later in *Business Men's Assur. Co.* v. *Campbell*, 18 Fed. (2d) 223), an additional attorney's fee should have been taxed in the lower court. This court should now correct the omission by taxing such a fee here in addition to affirming the trial court's judgment. Such a fee was taxed by the Sixth Circuit Court of Appeals for both the trial court and the appellate court (*L. & N. R. Co.* v. *Dickerson*, 191 Fed. 705, 712) Cf. *Gulf, Etc., R. Co.* v. *Walker*, 104 Miss. 363; *Finucane* v. *R. Co.*, 169 Ill. App. 175).

IV.

THE AMOUNT OF THE FEE

The district court's allowance of 10 per cent of the recovery for services in that court was strictly within the limits of the state court's practice which has allowed in such cases 21 per cent (*O'Shea* v. *Hotel Co.*, 111 Neb. 584), 12½ per cent (*Wirtele* v. *Grand Lodge*, 111 Neb. 306), and 10 per cent (*Cent. Neb. Co.* v. *Olson*, 111 Neb. 402). The Fifth Circuit Court of Appeals in a similar case upheld an allowance of 10 per cent of the face of the policy (*Hartford Fire Ins. Co.* v. *Wilson*, 4 Fed. (2d) 837). The lower court, in its latest decision on the question, allowed 10 per cent for each trial at *nisi prius* (*Business Men's Assur. Co.* v. *Campbell*, 18 Fed. (2d) 226), and in a previous one, where "there was no evidence as to a reasonable amount," said that—

> "the court is as good judge of reasonableness of attorney fees for services in that court as anyone. Any testimony as to what would be a reasonable fee would be in the nature of expert evidence and, as such, advisory but not binding upon the court." (*Globe Indemnity Co.* v. *Bath Co.*, 299 Fed. 222.)

In this case respondent has compelled petitioners to pursue their now admittedly just claim through two appellate courts in each of which the expense of employing counsel was fully as great as in the trial court. If Respondent had not ap-

pealed to the lower court and there sought and obtained an erroneous judgment, petitioners would not have been forced to come to this court. It was just such a case that the statute was designed to cover, and we respectfully ask this court to apply it and besides reinstating in full the trial court's judgment, to allow 10 per cent thereof as an attorney's fee in the appellate proceedings.

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Number 196.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1927.

THE PEOPLE OF SIOUX COUNTY, NEBRASKA (SUING BY EDWIN B. LYON, TREASURER), PETITIONER,

v.

NATIONAL SURETY COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT.

ANDREW M. MORRISEY, Omaha, Nebraska,
Attorney for Respondent.

RUSH C. CLARKE,
JAMES G. MOTHERSEAD,
R. T. YORK, Scottsbluff, Nebraska,
Of Counsel.

May It Please the Court:

The petitioner herein has filed recently what is termed "Petitioner's Supplemental Brief," purporting to supplement the original brief incorporated with its petition for

writ of certiorari. This supplemental brief contains no statement of the facts, no statements regarding the judgment of the lower court, the claims advanced or the rulings made, no specification of errors, and the argument is more or less supplementary in character and so disjointed, taken by itself, as to be unintelligible.

Our understanding of the rule is that the petitioner must file his brief three weeks before the case is called. Petitioner in this case failed to do this, and now seeks to redeem himself by standing on his petition for writ of certiorari, together with his supplemental brief. We understand that the petition for writ of certiorari cannot be petitioner's brief on the case, and undoubtedly the supplemental brief should comply with the rules of this court.

The result is that it will require diligent searching of the records by this court to learn what is involved here. To simplify the matter, we here endeavor to give a very short

STATEMENT OF THE FACTS.

The respondent, the National Surety Company, as surety with the First National Bank of Harrison, Nebraska, a national bank with a paid-up capital stock of $50,000.00, executed a depository bond (Trans. of Rec. pp. 44-47). This bond was a statutory bond required by law. It was given to protect the county treasurer of Sioux County, Nebraska, in the deposit of public moneys of Sioux County in the First National Bank. Under Nebraska statute, hereafter referred to, the treasurer was prohibited from depositing an amount equaling more than 50 per cent of the paid-up capital stock of the bank, in this case $25,000.00. The penalty of the bond, however, was $30,000.00. During the term of the bond the county treasurer deposited $35,395.70. However, the county treasurer, in addition to the

respondent's bond, took the bond of certain individuals in the sum of $10,000.00, which is denominated an excess bond.

The bank became insolvent and closed its doors. Thereupon, Lyon, treasurer of Sioux County (not the people of Sioux County, who have no standing in any court under our law), sued the respondent in the District Court of Sioux County, Nebraska, for full penalty of the bond, $30,000.00, with interest (Trans. of Rec. pp. 1-8). The removal was taken to the District Court of the United States for the District of Nebraska, Chadron Division, where plaintiff filed an amended petition (Trans. of Rec. p. 16 et seq.). This was a copy of the original petition, except that it prayed for a taxation of an attorney's fee for plaintiff as costs. Defendant, the respondent, answered, admitting the giving of the bond, making of the deposits, etc., and pleaded as its principal defense that the paid-up capital stock of the First National Bank of Harrison, Nebraska, was $50,000.00; that, under the laws of Nebraska, the county treasurer was forbidden to deposit any sum in excess of 50 per cent of the paid-up capital stock, and at the time of giving of the bond it was well known and understood by all parties that he was limited to make deposits over 50 per cent of the paid-up capital stock of the First National Bank of Harrison, Nebraska, and that the plaintiff, realizing and recognizing that the bond of the plaintiff secured only $25,000.00, took the additional bond of private individuals in the sum of $10,000.00. The plaintiff for reply (Trans. of Rec. p. 27), pleaded that the *People of Sioux County* are not estopped by any of the alleged acts of the treasurer of said county claimed by the defendant to be illegal. Jury waived, case tried to the court on stipulation of facts (Trans. of Rec. p. 39), which stipulation is chiefly a restatement of the pleadings.

The question presented in the district court was purely a question of law, to-wit: Under the statutes of the state of Nebraska, is the surety on depository bonds liable for deposits made in the bank in excess of 50 per cent of the paid-up capital stock in violation of the laws of the state of Nebraska? and (2) can attorney fees for the plaintiff in such action be taxed against the defendant as a part of the costs?

The district court answered both questions in the affirmative.

By appropriate proceedings error was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the same questions were argued, and in an opinion written by Judge Lewis of the circuit court, filed December 20, 1926, the reasons for a judgment of reversal, with directions to set aside the judgment and vacate the order taxing attorney's fees were given, and the Circuit Court of Appeals on the same day entered its judgment that the judgment of the district court be reversed, that the National Surety Company recover its costs, that the cause be remanded to the district court with directions to set aside the judgment, vacate the order taxing attorney's fees and dispose of the case according to the views expressed in the opinion of the circuit court.

The district court, over defendant's objection, taxed a $3000.00 attorney's fee as part of the costs to be paid by the defendant to the plaintiff. Through all the briefs and arguments of the plaintiff and petitioner here, it has been sought to convey the impression that this law suit involves $30,000.00. However, the fact is that there is only involved the sum of $5000.00. The defense has been at all times that the National Surety Company is liable only for $25,000.00, that is, the amount which the treasurer of

Sioux County may legally have deposited in the bank. So the only dispute is over the excess of $5000.00 which the plaintiff sought to recover. The United States Circuit Court of Appeals has held that the National Surety Company had a right to assume that the county treasurer would obey the law and would only make legal deposits. Considerable argument was made in the lower court and will perhaps be made in this court that the defendant is attempting to plead the illegality of its own contract. This is not true. We have admitted the legality of the contract, but plead that the treasurer violated the law and the contract by depositing more than the contract, as interpreted in the light of the law, said he might.

PROPOSITIONS OF LAW.

I.

Under the laws of Nebraska a county treasurer is prohibited from depositing county moneys in any bank in excess of 50 per cent of the paid-up capital stock of such bank, and for him to do so is made a misdemeanor.

Sec. 6193, Comp. Stat. Neb. 1922.

II.

A statute limiting the amount which a county treasurer may deposit in a bank becomes by construction a part of the depository bond given to protect funds deposited in such bank by a county treasurer.

Cole v. *Myers*, 100 Neb. 480, 160 N. W. 894.

Balco v. *State*, 58 Neb. 557, 78 N. W. 1056.

III.

The surety on a bank depository bond is not liable for more than the amount which the county treasurer was authorized to deposit in the bank, although the bond

was for more than that amount; the liability of the bondsman is limited to the amount legally deposited.

Cole v. *Myers*, 100 Neb. 480, 160 N. W. 894.

In re State Treasurer's Settlement, 51 Neb. 116, 70 N. W. 532.

Territory v. *Mills*, 16 N. M. 555 (1920), p. 325.

Fremont County v. *Fremont County Bank*, 138 Ia. 167, 115 N. W. 925.

Same, second appeal, 145 Ia. 8, 123 N. W. 782.

Yellowstone County v. *First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596.

Mills v. *Territory*, 235 U. S. 687.

IV.

A statute limiting the deposit of public funds implies a rule of public policy and the courts will not enforce a contract looking to the breach of such a statute.

Western Indemnity Co. v. *Crafts*, 240 Fed. 1607 (C. C. A. 6th).

V.

The provisions of the Nebraska statute for allowance of attorney fees in actions of this kind are purely provisions for taxation of costs and are not statutes incorporating the provisions thereof in the contract of insurance.

Sec. 7811, Comp. Stat. Neb. 1922.

Nye-Schneider-Fowler Co. v. *Bridges & Hoye Co.*, 98 Neb. 27, 151 N. W. 942, 98 Neb. 863, 155 N. W. 235.

Ward v. *Bankers Life Co.*, 99 Neb. 812, 157 N. W. 1017.

Reed v. *American Bonding Co.*, 102 Neb. 113, 166 N. W. 196.

VI.

The federal statute makes express and exclusive provision for allowance of attorney fees as costs.

Sec. 823 U. S. Rev. Stat., (1375 U. S. Comp. Stat. 1916).

Sec. 824 U. S. Rev. Stat. (1378 U. S. Comp. Stat. 1916).

VII.

Where the federal statute makes express provision as to items of costs the federal courts can not follow the state statute or practice in that matter.

Re Michigan Aluminum Foundry Co. v. *Aluminum Co. of American, et al.*, 190 Fed. 903.

United States v. *Treadwell*, 15 Fed. 532.

O'Neill v. *Kansas City, S. & M. R. Co.*, 31 Fed. 633.

Jerman v. *Stewart*, 12 Fed. 271.

Swancoat v. *Remson*, 76 Fed. 950.

Turllock v. *Mulvane*, 184 U. S. 497, 46 L. Ed. 657.

VIII.

Where congress has legislated and fixed fees that can be allowed as costs, no further fees can be allowed by the court therefor.

Jerman v. *Stewart*, *supra*.

The Baltimore v. *Rowland*, 8 Wall. 377, 19 L. Ed. 463.

IX.

A decision of a federal court upon a statute will not be reviewed because of a subsequent adjudication upon the statute by the state court.

Hoffman v. *Knox*, 50 Fed. 488, 1 C. C. A. 535.

King v. *Dundee Mortgage Investment Company,* 28 Fed. 333.

Burgess v. *Seligman,* 107 U. S. 20, 27 L. Ed. 359.

ARGUMENT.

The discussion of the case divides itself into two major questions. First, is the respondent liable to the county treasurer for funds deposited by the treasurer in excess of 50 per cent of the paid-up capital stock, and second is the defendant in error entitled to have an attorney's fee taxed as part of the costs under the provisions of the Nebraska statutes in an action pending in the Federal Court?

If our view on the first question is upheld by this court as it was by the Circuit Court of Appeals, consideration of the second will not be necessary. Both questions, however, are discussed in the order stated.

Is the plaintiff in error liable for excess funds unlawfully deposited?

That part of Section 6193, Compiled Statutes of Nebraska for 1922, which it is necessary to notice for the purposes of this case is as follows:

> "The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half of the amount of the bond on such bank, and the *amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent of the paidup stock of such bank.*"

(Note—the italics are ours, and to avoid repetition we will say here that all instances of italics throughout this

brief did not appear in the cited cases, but are used for emphasis.)

Aside from the part quoted the section provides at length for the giving of the required depository bonds for the deposit of county moneys by county treasurer and their approval, and provides for the deposit of county moneys in banks out of the county in cases where the county treasurer has more money in his hands than he is authorized to deposit in banks in the county, that is to say, more than an amount equal to one-half of the paid-up capital stock of all banks in the county.

Section 6195 makes it a misdemeanor for a county treasurer to fail or refuse to do or perform any duty required of him by the article.

It is undisputed that at all times from before the bond in suit was executed and filed until the failure of the bank, the First National Bank of Harrison was an authorized depository of Sioux County, Nebraska, moneys, and that the capital stock of the bank was $50,000.00, and it is also undisputed that at the time the bank failed and closed its doors there was on deposit in the bank to the credit of the county treasurer, the sum of $35,395.70.

Under the laws of Nebraska, in consideration of the capital stock of the bank, the county treasurer was authorized to deposit in this bank $25,000.00 and no more. He deposited more than that amount, and brings suit for the entire amount to the extent of the bond, and the question presented thereby is whether the National Surety Company is liable for more than $25,000.00 with interest thereon.

In Nebraska this question has been discussed by the Supreme Court twice. The first time the question arose under the law then existing prohibiting the deposit of public funds in excess of one-half of the amount of the depository bond given by the bank. (*In re State Treasurer's Settlement*, 51 Neb. 116, 70 N. W. 532). In this case the incoming treasurer in a controversy with his predecessor, who had deposited state funds in banks in excess of the amount authorized by law to be deposited, contended that by such unlawful deposits the outgoing treasurer had rendered the entire bond invalid. The court in answering this contention said:

> "The depository law has fixed the maximum which the treasurer shall have on deposit in any bank at the same time at one-half of the amount of the bond executed by the bank. This is a limitation not only upon the *power* of the treasurer to deposit but restricts the bank from demanding a larger sum than one-half of the penal sum named in the bond. Were it not for this limitation, unquestionably a depository bank and the sureties upon the bond would be liable, in case of a breach of its conditions, to the extent of the full penalty written in the bond. If the treasurer exceeds his duty by depositing a larger sum in a depository bank than he is authorized by law to do, it does not affect the liability of such bank and the sureties on its bond to repay the state the *sum deposited therein in strict conformity to the requirements of the depository law* and the accretions thereof."

The same question was again discussed by the same court in *Cole* v. *Myers*, 100 Neb. 480, 484, 160 N. W. 694, the court using the following words:

> "The statute is by construction a part of the depository bond (*Blaco* v. *State*, 58 Neb. 557). In entering into the contract of suretyship the *surety*

had a right to assume that the treasurer would comply with the statute and limit his deposit to $10,000.00. The bond was given to protect legal deposits of the county funds to the contractual and statutory maximum of $10,000.00 and not as security for an illegal deposit in excess of that sum. Both the surety's liability and the debt protected by the suretyship are limited to $10,000.00. In paying the amount of the bond, the bank's surety not only discharged its legal liability, but also discharged the entire debt to secure which the bond was given. The terms of the contract of suretyship, when considered with the statute and with the public duties of the treasurer will admit of no other construction.

"The bank's surety paid the entire debt for which the depository bond was given as security. If injury to the county would result from permitting the bank's surety to share the dividend, the county's loss would not grow out of the debt secured by the depository bond. Such loss, if any, would be traceable to the illegal conduct of the treasurer in making deposits in excess of the penalty named in the bond. For this wrongful act on the part of the treasurer neither the bank's surety nor the county is in anywise responsible. If the treasurer had complied with the law the principal's debt would be paid in full and the amount of the bank's surety to subrogation would be unassailable. In that event the ultimate loss of the bank's surety would be less than the maximum amount for which the depository bond was given. To deny or postpone subrogation because the treasurer for whose wrongful act the bank's surety was not responsible, made overdeposits in violation of law would extend the liability of suretyship."

We again call special attention to the first sentence in the foregoing quotation:

"The statute is by construction a part of the depository bond."

To the same effect see *Blaco* v. *State,* 58 Neb. 557, 78 N. W. 1056. In some of the cases hereinafter referred to the limitation of the deposit was made after the giving of the bond. It is of value to note that the limitation provided by Section 6193, referred to above, is a part of the same section providing for the giving of the depository bond.

Fremont County v. *Fremont County Bank,* 138 Ia. 167, 115 N. W. 925, was a case growing out of the following situation: The bank executed and delivered to the county a depository bond in the sum of $2000.00 to secure deposits of county funds. Several months thereafter the county board fixed the limit of county funds to be deposited in that bank at $1000.00. Over that amount was deposited by the treasurer. From the opinion:

> "Assuming that the bond was good when executed, either as a statutory bond or as a common law obligation, it does not follow that defendant's liability extended to the full amount of the penalty therein named, to-wit, $2000.00, or to the full amount of the deposits made in the bank by the county treasurer.
>
> * * * "If the bond be treated as valid from its delivery in January, the resolution of May 3rd had the effect to reduce the sureties' liability thereunder to the amount named in that resolution. The sureties had the right to rely upon the county treasurer immediately reducing the amount to the sum authorized, and in view of that resolution the county cannot now be heard to say that notwithstanding the neglect of its officers to do their duty toward the sureties it will hold them to the full amount of the loss, not exceeding the penalty named in the bond. The resolution provided that no more than $1000.00 should be deposited in the defendant bank, and the county treasurer if he had done his duty

would have diminished his deposit to that amount; and the *sureties on the bond had the right to rely upon his doing so.* In other words, the amount of their liability was by this resolution reduced to the sum authorized to be deposited in the defendant bank. So that, no matter whether the bond be valid from its inception, or validated by the resolutions of May 3rd, 1904, defendant's liability is limited by the resolution to the sum of $1000.00 and to that extent only may they be liable."

Under the law in Montana the county treasurer was required to have security in double the amount of his deposits of county money. In *Yellowstone County* v. *First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596, the treasurer had secured a bond of $25,000.00 to protect deposits in the bank, but had deposited $33,000.00. The court held that but $12,500.00 was protected by the bond, and that the balance was unlawfully deposited and was a trust fund. *In re Treasurer's Settlement, supra,* was cited and approved. In deciding the case the court said:

"With the acceptance of this bond for $25,000.00 then, the treasurer could lawfully keep on deposit with this bank county funds to the amount of $12,500.00, and the deposit of such funds to that amount would constitute a general deposit authorized by Section 3003 above, and to that extent the county would give its consent to become a general creditor of the bank, and that its funds to that amount might become the funds of the bank to be commingled with its other funds and assets. At the time this bond was given it constituted good and sufficient indemnity for the deposit of the county funds to the extent of $12,500.00. * * *

"The fact, however, that the deposit of county's funds to the extent of $12,500.00 was secured, does

not reflect in the least upon the status of the $20,500.00 kept on deposit in this bank without security, and in violation of law. The act of the treasurer in keeping this excess on deposit without the security required by Section 3003, is denounced by Section 8592, Revised Codes, as a felony; and the treasurer and the bank officials are chargeable with knowledge that the use to which these county funds were thus put was altogether illegal and wrongful, and that the county, the rightful owner of such excess, did not consent to such use and did not part with its title to the funds thus employed (*State* v. *Thum*, 6 Idaho 323, 55 Pac. 858). The only method by which the county could give its consent that its funds might be placed on general deposit was by speaking through the legislature as it did in Section 3003 above. To the extent that the provisions of that section were complied with, it gave its consent, and beyond that it did not and could not go."

And in the same case:

"The deposit of $20,500.00 excess, without security was wrongful and unlawful. The county did not consent thereto, never parted with its title to such funds, and the treasurer and the bank officers knew of these facts, being chargeable with knowledge of the law. The bank was an active participant in the wrong, and the result follows as of course that as to such excess the bank held it as a trustee *ex maleficio*, for the use and benefit of the county (*State* v. *Thum*, above). *Wolfe* v. *State*, 79 Atl. 207, 58 Am. Rep. 590; Meecham on Public Officers, 922.

"If the county treasurer had performed the duties of his office as required by law he would have withdrawn this $20,500.00 from the bank on March 1, 1910, if not earlier, and the fact that he did not do so only serves to demonstrate that by his wrongful act the county funds were made to swell the apparent assets of the bank to that amount. No one will be

heard to say that these funds wrongfully in the bank should not be withdrawn; no one can be injured by having that done which ought to have been done."

"The legislature having designated the particular instance, and the only one, in which the county's funds may be placed on general deposit, it was not *within the power* of anyone else to consent to a general deposit of such funds under any other circumstances."

Idem.

Territory v. *Mills*, 16 N. Mex. 555, 120 Pac. 325: This was a case where the county treasurer deposited $20,000.00 where he was authorized to deposit but $10,000.00. The court held that bond secured by $10,000.00, saying:

"Whatever deposit was made by the treasurer above the amount to which the bank was entitled under the law was made by him as an individual depositor upon his own responsibility, for which, in case of loss, he would be liable under his official bond; but such excessive deposit could not have been made with reference to the bond now sued on and could not affect the liability of the surety any more than a deposit made by another individual. This position not only commends itself as a matter of reason, but is well supported by authorities."

This case was later affirmed by the United States Supreme Court and the opinion is reported in 235 U. S. 687.

Western Indemnity Co. v. *Crafts*, 240 Fed. 1, was a suit on an indemnity agreement given upon the execution of a depository bond to protect deposit of public moneys with a trust company in violation of law. The court, in denying the recovery, says:

"It is further contended that since the statute does not in terms make it a crime to receive a deposit of

money belonging to the state, nor expressly denounce as unlawful a bond given to secure the repayment of the money, it must result that the indemnity contract in suit cannot be regarded as unlawful. The learned counsel endeavor to establish this proposition by decisions which were applicable, are of course authoritative (citing cases), but we do not regard these decisions as applicable here. Upon the facts admitted by the demurrer to the present petition it cannot reasonably be doubted that, when the indemnity contract in issue was executed and delivered, all the parties named in the instrument knew it was an essential step in a design to induce the treasurer of the state of Ohio to deposit moneys of the state with the Euclid Company, and obviously the parties were chargeable with notice of the statute which denounced such an act of the treasurer as a felony. In saying that this was the purpose of the indemnity contract, we have in mind that the state treasurer was not a formal party to the contract, but upon the admitted facts it is perfectly evident that the Federal Company would not have indemnified the state treasurer by becoming surety upon the Euclid Company's bond unless the defendants had in turn secured the Federal Company by this indemnity contract. Thus it is sought to enforce a contract which was executed and received with the plain intent and purpose to promote a scheme to divert state moneys from the state treasury to the Euclid Company, and while it is true, as counsel insist, that the statute did not in terms make it a crime to receive and secure deposits of state moneys, still the inhibition of the statute is broad enough to forbid a scheme looking to such a diversion of state moneys. The statute clearly implies a rule of public policy which is condemnatory of such a scheme, and the effect of this was to taint the very consideration upon which the indemnity contract was founded."

Considerable was made at the trial and in the Circuit Court of Appeals of the fact that to comply with the depository law would be difficult for the county treasurer and great efforts have been made toward enlisting the sympathy of the court toward the people of the county of Sioux who are said to be without guilt and to be the victims of the decision of the Circuit Court of Appeals; and that effort has gone so far that this case has been brought into this court under a false title. The people of the county of Sioux or Sioux County will not suffer. The county treasurer is by law required to file an official bond which protects the county in situations such as this.

Great reliance has been placed on the decision of the Nebraska Supreme Court in *State* v. *State Bank of Anselmo*, on rehearing, 111 Neb. 136, 198 N. W. 1018. This opinion on the rehearing held that the guaranty fund of the state of Nebraska was liable for excess deposits of county funds. This decision was based upon the proposition that the guaranty fund statute did not put a limitation on the amount which might be deposited by the county treasurer in a state bank, because the Nebraska statute provided that no state bank which had complied with the provisions of the guaranty fund act should be required to give security, but that depository funds should be secured in the same manner that private funds are secured.

In the first opinion the court held:

> "If, then, the limitation is still effective, it follows as a matter of course that the deposits made by the treasurer in the bank in excess of $7500.00 were in violation of the express terms of the statute. The question then arises: Is the guaranty fund liable for the payment of the excess? The liability of the guaranty fund is somewhat analogous to the liability of a suretor or guarantor."

And it was held that the guaranty fund was not liable for the excess. It will be noted that the court in the first opinion said that this rule applied if the limitation was still effective. In the second opinion it was held that it "might with good reason be urged that the legislature intended to repeal the provisions of the depository law in so far as it affected state banks." Three of the judges of the Nebraska Supreme Court dissented from the second opinion, adhering to the first, and even in the second opinion the conclusions quoted above from the first opinion were not rejected, but were avoided.

The inapplicability of the Anselmo case is further shown by the fact that very recently the Supreme Court of Nebraska has held in the case of *Rogers, Receiver*, v. *Natl. Surety Co.*, — N. W. —, that the guaranty fund is a guarantor and not a surety. There is no reason, therefore, for applying the rules applicable to a guarantor of deposits in a state bank to the situation of a surety of deposits in a national bank.

Has the Supreme Court of Nebraska reversed itself and if so, has such reversal any effect on this case?

Since this case was decided by the Circuit Court of Appeals the Supreme Court of Nebraska has decided the case of *Scotts Bluff County* v. *First National Bank*, 212 N. W. 617. This opinion was filed March 1, 1927. The opinion and judgment in the case at bar were filed December 20, 1926, in the Circuit Court of Appeals.

The case referred to appears on its face to sustain the contention of the petitioner here. However, it will be noted that the bond was for $5000.00, while the treasurer might lawfully have deposited $12,500.00. That at the time the bond was given there was $50,000.00 on deposit

of public moneys in the bank; that numerous other sureties had executed bonds, none of which were over $12,500.00. The defendant in that case was not required to pay more than the amount which the treasurer might lawfully have deposited; in the first place, there was no way of ascertaining which part of the $50,000.00 was the unlawful excess, and in the second place the surety knowingly executed its bond after the law had been violated.

Much of the argument of the court in the opinion was unnecessary to the decision of the case.

Furthermore, prior to that opinion, it may be said that the Supreme Court of Nebraska had held that a surety on such a bond was not liable for excess funds unlawfully deposited, as is shown by the cases cited in this brief.

Counsel for respondent would tell this court that the question had never been decided in Nebraska. For the purpose of this part of the argument it is immaterial, for it is a well settled rule that the courts of the United States will not review a judgment of the lower Federal court because such judgment is inconsistent with a later decision of the higher court of the state. If the state courts have not construed the statute the Federal court will adopt their own interpretation of the law applicable to the case, and such interpretation will not be disturbed because the state court later adopted its interpretation inconsistently with that of the Federal court. Much more so where the state court has construed the statute and the Federal court has adopted the state court's construction. In such case the rule is clear that the appellate court will not reverse the Circuit Court of Appeals, because the state court may have reversed it.

It has been held:

> "When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts will adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."
>
> 25 C. J. 843.

Literally hundreds of cases are cited in support of this text, decisions of this court and almost every Federal court of the land.

This rule was very ably stated by Mr. Justice Bradley in *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. Ed. 359, as follows:

> "When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The Federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the con-

> struction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

This rule is, of course, well recognized, and we believe further citation to be unnecessary. The contracts and transactions involved herein were entered into while the decision of the state of Nebraska in *In re State Treasurer's Settlement*, 51 Neb. 116, 70 N. W. 532; *Cole* v. *Meyers*, 100 Neb. 480, 160 N. W. 694, and others were assumed and thought to be the settled law in this state. The Circuit Court of Appeals, after an examination of the Nebraska authorities, decided that such was the law in this state. And as was well said by Judge Lewis in the opinion of the lower court the position that a depository bondsman is liable only for legal deposits is "reasonable, just and based on sound principle." Numerous other courts have expressed the same views and it is respectfully submitted that this court should not reverse a decision based on sound conclusions and a decision in conformity with the then setled law of Nebraska, because the Supreme Court of Nebraska has reversed itself since the transactions involved occurred and since the Circuit Court of Appeals entered its judgment.

Right To Tax Attorney's Fees as Part of the Costs.

When the district court entered judgment against respondent, defendant there, it included in the judgment the following allowance of attorney's fees (Trans. of Rec. p. 31):

> "It is further ordered by the court that the sum of $3000.00 be and the same is hereby allowed to the plaintiff for said E. D. and F. A. Crites, as attorney's fees and that the clerk of this court do tax the same as costs against the said defendant in addition to said judgment, said sum to bear no interest, to which order the defendant excepts."

The Circuit Court of Appeals reversed that part of the judgment of the district court and remanded the cause with directions to vacate that part of the judgment.

Complaint is here made of this.

We will first discuss the question as it was discussed in our brief in the Circuit Court of Appeals as we believe the views therein expressed, which were in great part adopted by the Circuit Court of Appeals in its opinion (Trans. of Rec. pp. 59-63), are a clear statement of our contention on this question. We will then call attention to the ridiculousness and fallacy of the answer to this contention contained in the brief of petitioner.

Presumably the district court did this under the authority of Section 7811, Compiled Statutes of Nebraska for 1922, which is as follows:

> "In all cases where the beneficiary or other person entitled thereto brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity, or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary

> association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

It therefore becomes necessary to decide: (1) The nature of this statutory provision for attorney fees, whether it is something which is read into the contract of insurance or whether it is really a matter of costs and relates to the remedy; (2) If it is a matter of costs, can the state statute govern in the Federal court?

As to the question whether or not this is part of the contract of insurance or is a statutory provision for costs not only does the express wording of the statute that the same is "to be taxed as part of the costs," but the repeated decisions of the Supreme Court of the state of Nebraska, construing the statute, leave no doubt. The question was first considered in the case of *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co.*, 98 Neb. 27, 151 N. W. 942, 98 Neb. 863, 155 N. W. 235. The question was squarely presented. The suit was on a bond given by a contractor and the Lion Bonding & Surety Company, a surety company operating in the state of Nebraska. The bond was entered into prior to the passage of the act hereinbefore cited. The suit was brought after the passage of the act. In the first holding of the case reported in 98 Neb., page 27, the supreme court evidently took the view that the act was simply to be read into and become a part of the contract of insurance thereafter made and refused to allow any attorney fees, saying:

> "The act of 1913 is quite analogous to the act of 1873, and by those decisions the allowance of attorney's fees under the statute depends upon the existence of the statute at the time of entering into the contract. It seems clear that the legislature by the act of 1913 did not intend to impair the obligations of existing contracts."

Rehearing was, however, allowed, and the opinion of the court on rehearing, reported in 98 Neb. 863, 155 N. W. 235, recedes from the former opinion and expressly holds that the statute applied to contracts entered into before passage of the statute. In order to do this it was necessary to expressly decide that the statute provided for an allowance of costs, that it related to the remedy only, and therefore applied to contracts entered into prior to the passage of the statute. The court says:

> "If the new statute adds an additional burden to the contracting parties that without the statute would not exist, it has generally been considered that such statute could not be applied to a contract entered into before its enactment. However, in *Security Co. v. Eyer*, 36 Neb. 507, in determining the question here presented, it is said, 'Attorney's fees in states where they are allowed by the court to the successful party are in the nature of costs and are taxed and treated as such. They are no part of the judgment proper.' In *Insurance Co. of North America* v. *Bachler*, 44 Neb. 549, 565, in deciding the same point, it is said, 'We know of nothing in the Constitution which prohibits the legislature from enacting that the successful party in litigation may recover a judgment against his adversary for the amount of the costs expended or accrued by him in the prosecution of such suit, nor do we know of anything that prohibits the legislature from including in the term costs a reasonable attorney's fee.'

"These decisions are adhered to in *American Fire Ins. Co.* v. *Landfare*, 56 Neb. 482, and *Home Fire Ins. Co.* v. *Weed*, 55 Neb. 146. If these decisions are inconsistent with *White* v. *Rourke*, 11 Neb. 519, and *Bond* v. *Bolby*, 17 Neb. 491, and other cases following them, we do not feel at liberty to disregard the later cases, and must therefore hold that attorney's fees under this statute, as being a part of the costs of the litigation, relate to the remedy, and that it was the intention of the legislature that this statute providing for attorney's fees in such cases should apply, in all actions upon such contracts, whether the contract was made before or after the enactment of the statute."

This decision has since been adhered to and is the law in the state of Nebraska.

Ward v. *Bankers Life Co.*, 99 Neb. 812, 157 N. W. 1017.

Reed v. *American Bonding Company*, 102 Neb. 113, 166 N. W. 196.

It thus clearly appears that this statute is purely a matter of allowance of costs. It appears to be beyond controversy that the same being a matter of costs purely, if the federal statute expressly provides for the costs, the federal court can make no allowance except that allowed by the federal statutes.

The federal statute makes express provision on the question of attorney fees to be taxed as costs. Section 823 of the Revised Statutes, being Section 1375, United States Compiled Statutes, for 1916, provides as follows:

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and

printers in the several states and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government and such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties."

And Section 824, Revised Statutes, being Section 1378, United States Compiled Statutes for 1916, itemized the attorney fees and allowance to which an attorney is entitled. The particular portion of the section applying to the case at bar being as follows:

"In cases at law when judgment is rendered without a jury, $10.00."

The federal statute making express and exclusive provision for the allowance of attorney fees as costs, the district court obviously was in error in allowing any additional attorney fees as costs because of the state statute on this matter.

In *Michigan Aluminum Foundry Co.* v. *Aluminum Company of America*, 190 Fed. 904, the court says, on the question of allowing attorney fees:

"If acts of congress make specific provisions for costs, they control. If they make no provision for certain kinds of costs, the provisions, if any, of the state statutes may be followed (*Scatcherd* v. *Love*, 166 Fed. 53, 91 C. C. A. 639, and cases cited). At least if they do not result in injustice in a particular case (*Primrose* v. *Fenno*, 113 Fed. 375). Such seems to be the prevailing doctrine at this time.

"Sections 823 and 824, Revised Statutes (U. S. Comp. Stat. 1901, p. 632), distinctly provide that

attorneys shall be allowed certain fees, and no others. On the subject of attorney fees this act controls. It makes no provision for attorney fees on motions. Hearing on a motion is not a final hearing of the cause, upon which the statutory docket fee may be taxed. No attorney fee can be allowed on the motion."

In *United States* v. *Treadwell,* 15 Fed. 532, the court says:

"This section is taken without change from the act of 1853. By Section 823, above quoted, it is provided that the fees following 'shall be taxed, except in cases otherwise expressly provided by law'; i. e., by some law of congress, not of the several states. Taking the two sections together, therefore, it would seem to follow necessarily that the fees referred to in Section 823 must be taxed in favor of the 'prevailing party,' and 'against the losing party,' in all cases, 'except where otherwise expressly provided by law.'

"The language of Section 823, by its natural meaning and import, seems to me plainly to cover the whole question of the right to costs; for it declares that the following fees 'shall' be allowed to attorneys, etc., except in cases expressly provided by law, i. e., the attorneys of the prevailing party shall be entitled to costs in all cases, 'unless otherwise expressly provided by law.'

"I cannot perceive any reason for the change in the phraseology of Section 823 from the language of the act of February 26, 1853, except for the purpose of making this definite provision as to the right to costs, which the act of 1853 did not do. If such is the proper interpretation and construction of Section 823, then it supersedes the law and the practice of the states in reference to the right to recover costs, since those laws are applicable only in the absence of any law of congress on the same subject. Section 721."

In *Jerman* v. *Stewart*, 12 Fed. 273, Judge Hammond, in deciding a motion to retax costs, says:

> "I do not wish to depart from the decisions which hold that where congress has legislated and allowed no fees, none can be allowed by the courts on the doctrine of reasonable compensation, and where this plain statute says that the officers enumerated shall receive certain fees and none other, that the courts cannot enlarge them."

The whole matter, we think, is succinctly stated by Judge Clifford, which opinion in *The Baltimore* v. *Rowland*, 8 Wall. 377, 19 L. Ed. 463, is as follows:

> "Fees of the attorney and counselor were prescribed by the first section of the act. They were a stated fee of $3.00 for drawing and exhibiting a libel, claim or answer in each cause; $3.00 for drawing interrogatories and $3.00 for all other services in any one cause; $9.00 only could be taxed for the services of an attorney or counselor, but the fourth section of the act provided that there be allowed and taxed in the federal courts in favor of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attorney and counselor's fees, except in the district courts, in causes of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states. Passed to continue in force only for the year, and from thence until the end of the next session of congress thereafter, it was suffered to expire, but it was renewed by the act of the 31st of March, 1796, and was continued in force two years longer, and to the end of the next session of congress.
>
> "Detailed provision was made by the subsequent act of the 28th of February, 1799, for compensation of marshals, clerks, district attorneys, jurors, witnesses, and criers, but the special provision allowing counsel fees was dropped.

"Even while it remained in force, it did not authorize such an allowance in a case like the present, as cases of admiralty and maritime jurisdiction in the district courts were expressly excepted from the operation of the provision. Ordinary costs in admiralty suits were doubtless taxed under that act, as if it was in force long after it had expired, but it never furnished any authority to charge counsel fees in the district courts, but if it did, and if it had not expired, it would be repealed by the present law.

"Fees and costs allowed to the officers therein named are now regulated by the act of the 26th of February, 1853, which provides, in this first section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed:

"Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated (10 St. At. L. 161). They may tax a docket fee of $20 on a final hearing in admiralty, if the libelant recovers $50, but if he recovers less than $50, the docket fee of the proctor shall be but $10.00. *The Canton*, 21 Law Rep. 473; *The Liverpool Packet*, 2 Sprague 37; *The Connestago*, 2 Wall. Jr. 116."

In *O'Neil* v. *Kansas City S. & M. R. Co.*, 31 Fed. 663, the court had under consideration the question of whether a party could have witness' fees taxed as costs that he had not paid. The practice in the state courts of Tennessee being that he could. The holding of the court on this point is reflected in the second paragraph of the syllabus as follows:

> "The federal statutes regulate the matter of fees and costs in the courts of the United States, and the statutes and practice of the state are not binding in matters comprehended by the federal statute. Hence any state practice of indulgence of credit for the fee of litigation until final judgment for costs, does not obtain in the federal courts, where the act of congress prescribed a specific regulations on the subject. The Tennessee practice of giving credit for fees until final judgment, and return of *nulla bona* against the losing party, is a voluntary indulgence by the persons entitled to the fees, and not perhaps a strict right under the statutes of the state."

In *Swancoat* v. *Remsen*, 76 Fed. 950, Circuit Judge Lacombe says:

> "The section of the United States Revised Statutes to which plaintiff refers adopts the practice of the state courts, so far as may be; but it does not adopt the state fee bill, either for costs or for official fees."

The extent to which the federal courts go in refusing to follow state practice as to allowance of attorney fees as a matter of costs is well illustrated in the case of *Turlock* v. *Mulvane*, 184 U. S. 497, 46 L. Ed. 657. In that case an action for injunction was started in the Federal Court of Kansas and an injunction bond given. Later the temporary injunction was dissolved. An action was brought on the injunction bond in the state court. The question presented was whether or not in the action in the state court could attorney fees be allowed as one of the elements of damage under the bond. The Supreme Court of Kansas held that this was an express item of damage and no question is made but what under the Kansas practice attorney fees were expressly allowed as an element of damage on injunction bonds. On error to the Supreme Court of the United States it was by

the court, in an opinion by Justice White, held: (1) That under the equity practice prevailing in the federal courts attorney fees were not expressly allowed to the adverse party when under an injunction bond. (2) That this being the law, even though under the Kansas practice, attorney fees were an express determination of damages, yet on an action in the state court on the bond no attorney fees could be considered because they would not be allowable in the federal court. The court quotes with approval from the case of *Bein* v. *Heath,* 12 How. 168, 13 L. Ed. 938, as follows:

> "Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United State, to the laws of the state. The proceeding in a circuit court of the United States in equity is regulated by the laws of congress and the rules of this court made under the authority of an act of congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The eighth rule authorizes the circuit court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.
>
> "And when an injunction is applied for the circuit court of the United States sitting in Louisiana, the court (may) grant it or not, according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond,

or not, from the complainant, with sureties before the injunction issued, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceedings upon such a bond, the court would have no authority to apply to it the legislative provisions of the state.

"Indeed, the principles announced in *Bein* v. *Heath* were in effect, but the reiteration of the doctrine previously established by this court, that a bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by this court, and operative throughout the courts of the United States. *Cox* v. *United States*, 6 Pet. 172, 8 L. Ed. 359; *Duncan* v. *United States*, 7 Pet. 435, 8 L. Ed. 739."

In this connection we have not overlooked the numerous cases in the Supreme Court of the United States discussing the question of the constitutionality of such statutes as the Nebraska statutes allowing attorney fees in suits against insurance companies. So far as we know, none of these various cases determine or discuss whether or not these statutes would apply to suits in the Federal court. Nor have we overlooked the case of *Williamson* v. *Liverpool Insurance Company*, 141 Fed. 54, or *Spring Garden Insurance Company* v. *the Amusement Syndicate Co. et al.*, 178 Fed. 519.

It appears that attorney fees were allowed on suits on insurance policies in this circuit. Neither of these cases discuss or in any way refer to the question of whether or

not these respective statutes were applicable in the Federal court, in view of the express provision of the Federal statute as to attorney fees, and are therefore not authorities on the proposition which we raise and, as a matter of fact, each of the cases could be decided as they were, even if our contention as to the law on the question of costs is adopted.

In *Williamson* v. *Insurance Company, supra*, this court held that a suit originating in Missouri in the Federal court on an insurance policy, the Federal courts would allow an attorney fee. The case does not discuss the question of the applicability of the state statute to the Federal court and the case is decided purely on the question of the constitutionality of the Missouri statute. If, however, the question had been raised the case could have been decided in the same way. The Missouri statute is not a question or proposition of costs as is the Nebraska statute, but is a statute which becomes a part of the contract of insurance. This distinction is clearly shown by the fact that the Missouri statute does not apply to policies issued prior to its enactment (*Thompson* v. *Traders Ins. Co.*, 169 Mo. 12, 68 S. W. 889), while as heretofore shown the Nebraska statute does, and is sustained purely as a cost statute. The case of *Spring Garden Insurance Company* v. *Amusement Syndicate Co., supra*, involved the Kansas statute as to attorney fees being allowed in suits on insurance policies. We have been unable to ascertain whether the Kansas court follows the Missouri or Nebraska interpretations of this statute. If it follows the Missouri interpretation obviously the attorney fees could be allowed as a part of a contract of insurance even though denominated as costs in the statute. The further fact, however, is to be noted in connection with this case, that the suit in the Federal court was an action to enjoin

several suits commenced in the state court on insurance policies and on refusal to allow the injunction the Federal court granted the same relief that the party would have obtained in the state court under the suits there commenced.

This case likewise does not discuss or determine the question presented herein as to the applicability of the state statute to proceedings in the Federal court.

A Short Discussion of Petitioner's Views.

In their supplemental brief counsel urges the doctrine of *Cole* v. *Meyer*, 160 N. W. 894, that the statute is by construction a part of the depository bond upon this court as being applicable to a question of the taxation of costs. They attempt in one breath to admit that while this statute allowing attorney's fees is one fixing costs, as squarely held in *Nye-Schneider-Fowler Company* v. *Bridges-Hoye*, *supra*, in cases like that case where the contract was made before the passage of the statute, yet they say if the statute had antedated the contracts it would have been treated as part of the contract. This is ridiculous. If the contract was made before the statute the statute is applicable because it provides for costs; if made after the statute it applies because the statute does not provide for costs. Certainly your honors cannot conceive of the Supreme Court of Nebraska doing anything like that.

And counsel says that under the doctrine of *Cole* v. *Meyer*, *supra*, this statute providing for costs became a part of the depository bond. Under what theory they insist a statute on court costs becomes a part of the bond we cannot understand. If it is based on the theory that the liability for such costs is contractual, we reply that the law of Nebraska recognizes no right of parties to contract for court costs or attorney's fees.

If the Supreme Court of Nebraska will not enforce a contract for attorney's fees incorporated right in the contract, certainly it will not read into the contract a statute providing for attorney's fees to be taxed as costs and enforce such provision as a contractual proposition.

In *Security Co.* v. *Eyer*, 36 Neb. 507, 54 N. W. 838, the Supreme Court of Nebraska held:

> "Attorney's fees in states where they are allowed by the court to the successful party are in the nature of costs and are taxed and treated as such. They are no part of the judgment proper."

And in the syllabus by the court it is said:

> "The said provision in the note for attorney's fees being contrary to the settled law of this state will not be enforced."

And the Supreme Court of Nebraska has adhered to this rule and refused to recognize the right of parties to contract for attorney's fees or other court costs.

Considerable argument is made to show that the statute does not provide for costs. The argument is rambling and fails to show any reason why *Nye-Schneider-Fowler* v. *Bridges-Hoye, supra; Ward* v. *Bankers Life Co., supra*, and *Read* v. *American Road Company, supra*, the latter being later than any of the decisions cited by counsel, do not mean what they say.

Furthermore, attention is called to the case of *Williams* v. *Insurance Company*, 141 Fed. 54, a case in which costs of attorney's fees under state statute of Missouri was allowed in the Federal court. Counsel asks how that could have been allowed except as costs. And they further state that the Missouri statute does provide for an attorney's fee to be taxed as costs, although the word "costs"

is not used in the statute, but we have already cited authorities in this brief showing that the Supreme Court of Missouri has passed upon the statute and squarely held that it was not costs. This case was heard in the Circuit Court of Appeals before one of the judges of the district court for the district of Missouri who was thoroughly familiar with the Missouri statute in question.

Again counsel states that the fact that *Spring Garden Insurance Co.* v. *Amusement Co.*, 178 Fed. 519, is applicable because there is no distinction between the rule applied as to costs in an equity case and a case on the law side of the court. If this be so, why did congress use this language in Section 8240, Revised Statutes:

> "In cases at law when judgment is rendered without a jury, $10.00 * * *

We call attention to these fallacies. We believe your honors will perceive that the entire argument of counsel for petitioner is equally fallacious.

Amount of Attorney's Fees.

The district court allowed a fee of $3000.00. Even if it were to be held that an attorney's fee should be taxed, this fee fixed by the district court is exorbitant. As we have said, only $5000.00 was involved. Counsel quotes authorities that 10 per cent is a fair fee in cases of this kind. If they were entitled to anything, it would not be more than $500.00.

It has been contended by petitioner that they thought the suit was for $30,000.00. Contrast that with the stipulation (Trans. of Rec. p. 42):

> "That plaintiff has demanded payment of the amount of said bond, together with interest from the date of the closing of the bank of the defendant

National Surety Company, but same has been entirely refused. The defendants, however, at all times have been ready, able and willing to pay their admitted liability of $25,000.00 under said bond, which plaintiff has at all times refused to accept; but no actual tender of any amount has ever been made."

No extraordinary effort was required in the trial of the case; there was no actual trial work in connection with it, and no evidence was introduced except the stipulation. The stipulation, with the exception of the exhibits, covers less than five pages, and we earnestly insist that this record shows on its face an allowance of $3000.00, if it can be said to be proper, is greatly excessive.

On these considerations it is respectfully urged that the judgment of the Circuit Court of Appeals in the case of *National Surety Company, Plaintiff in Error,* v. *Lyons,* be affirmed.

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SUPPLEMENTAL LIST OF POINTS AND AUTHORITIES

A contract of insurance is nothing but an agreement which must be given a just and rational interpretation. Written agreements are made to express the intention of the parties. Agreements are construed to ascertain and enforce that intention. From a consideration of the situation of the parties, the writing, its purpose, and the surrounding conditions, courts endeavor to ascertain what the parties intended to agree to do—upon what sense or meaning of the terms they used their minds actually met.

U. S. Fidelity & G. Co. v. Board, 145 Fed. 144, 148.
Accumulator Co. v. Dubuque St. Ry. Co., 64 Fed. 70, 74.
City of Salt Lake v. Smith, 104 Fed. 457, 462.
Fitzgerald v. First Nat. Bank, 114 Fed. 474, 482.
Merriam v. U. S., 107 U. S. 437, 27 L. ed. 531.
U. S. v. Peck, 102 U. S. 64, 26 L. ed. 243.

The bond in this case must be read as though there were incorporated in it the language of Section 6193, Comp. Stat. Nebraska 1922, providing that "the amount so on deposit at any time with (the First National Bank of Harrison, Nebraska) shall not exceed fifty per cent of its paid up capital stock."

Cole v. Myers, 100 Neb. 480, 160 N. W. 894.
Balco v. State, 58 Neb. 557, 78 N. W. 1056.
People v. Metropolitan Surety Co., 211 N. Y. 107, 113.
McCracken v. Hayward, 2 How. U. S. 608.
U. S. Fidelity & G. Co. v. Fultz, (Ark.), 89 S.W. 93, 95.
McHenry County v. Northern Trust Co. (N. Dak.), 200 N. W. 888.
City of Dickinson v. Dakota Nat'l Bank, 202 N. W. 277, 279.

Where there are statutory provisions relating to the deposit of public funds there is no authority to make deposit except to the extent and on the terms and conditions prescribed.

Van Vissiger v. Clay County, 54 Minn. 555, 56 N. W. 251.

Yellowstone County v. Billings, etc., Bank, 46 Mont. 439, 128 Pac. 596.

Lancaster County v. State, 97 Neb. 95, 149 N.W. 331.

Where there is an authorized general deposit with a depositary of public funds the resultant relation is that of debtor and creditor.

In re Salmon, 145 Fed. 649.

Caldwell v. King, 84 Iowa 228, 50 N. W. 975.

Yellowstone County v. Bank, 46 Mont. 439, 128 Pac. 596.

In re State Treasurer's Settlement, 51 Neb. 116, 70 N. W. 532.

State v. Bartley, 39 Neb. 353, 58 N. W. 172.

An unauthorized deposit constitutes a trust fund where the depositary knows that the fund belongs to the public.

Centralia v. U. S. Nat. Bank, 221 Fed. 755.

Blaine Co. v. Fuld (Ida.), 171 Pac. 1138.

In re Nampa Bank, 29 Ida. 166, 157 Pac. 1117.

Green v. Custer Co.. 8 Ida. 721, 71 Pac. 115.

State v. Thum, 6 Ida. 323, 55 Pac. 858.

Brown v. Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

Page Co. v. Rose, 130 Iowa 296, 106 N. W. 744, 5 L. R. A. N. S. 886, 8 Ann. Cas. 114.

Myers v. Clay Co. Bd. of Education, 51 Kans. 87, 32 Pac. 658.

Yellowstone Co. v. Billings, etc., Bank, 46 Mont. 439, 128 Pac. 596.

State v. Midland State Bank, 52 Neb. 1, 71 N.W. 1011.

The action of the treasurer in placing with the bank funds in excess of the legal limit was illegal and wrongful. The county did not consent to such use of its funds and did not part with title thereto. Such illegal use of funds was not a "deposit" as that term is used in the bond, since it did not make the bank a debtor to the county, but a trustee *ex maleficio.*

Yellowstone Co. v. Bank, 46 Mont. 439, 128 Pac. 596.

State v. Thum, 6 Idaho 323, 55 Pac. 858.

"No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authorities." Section 6196 Comp. Stat. Nebraska, 1922. This was construed in Lancaster v. State, 97 Neb. 95, 99, 149 N. W. 331, as meaning that "the county treasurer is not liable for deposits made if the bank had given a bond as specified in the act," unless, as was held in Hall County v. Cronin, 79 Neb. 424, 112 N. W. 561, "the amount of such deposit exceeds the sum which might lawfully be deposited."

"In entering into the contract of suretyship the surety had a right to assume that the treasurer would comply with the statute"; Cole v. Myers, 100 Neb. 480, 484, 160 N. W. 894; that he would do his duty in restricting deposits, Fremont County v. Fremont County Bank, 138 Iowa 167, 115 N. W. 925; that he "would obey the civil and criminal statutes", McHenry County v. Northern Trust Co. (N. Dak.) 200 N. W. 888.

In the case at bar it can be assumed, in construing the bond, that the respondent was willing to guarantee deposits under a legal depositary relationship up to the full amount of its bond, but it cannot be assumed that it intended "to stand sponsor for an illegal relationship", in any amount.

City of Dickinson v. Dakota National Bank (*N. Dak.*), 202 N. W. 277, 279, 280.

Where a contract was open to two constructions by one of which it would be lawful and the other unlawful, the former construction should be adopted.

Hobbs v. McLean, 171 U. S. 567, 29 L. ed. 940, 944.

The construction of the bond in this case is not to be controlled by the construction placed by the Supreme Court of Nebraska on some other bond even though written under the same statute. The question in each case is as to the intention of the parties to the bond, and not as to the meaning of the statutory provision limiting lawful deposits in a depositary bank to one half its paid up capital stock, which provision is so plain that construction thereof is wholly unnecessary.

Michigan Central Railroad Co. v. Myrick, 107 U. S. 27 L. ed. 325.

To construe the bond in this case as liable for deposits in excess of the statutory limit would tend to encourage such unlawful deposit of public funds and would be contrary to public policy. Western Indemnity Co. v. Crafts, 240 Fed. 1. This is a question of general law on which federal courts are not bound by state decisions but reach their own conclusions.

Hartford Fire Ins. Co. v. Chicago etc. Ry. Co., 70 Fed. 201, 203.

SUPREME COURT OF THE UNITED STATES.

No. 196.—October Term, 1927.

The People of Sioux County, Nebraska, Petitioner, *vs.* National Surety Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 20, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

The respondent, a surety company, as surety, and the First National Bank of Harrison, Nebraska, a designated depository for county funds, as principal, gave their bond to Sioux County, Nebraska, the petitioner, in the sum of $30,000. The bond, required by statute, was conditioned on the payment by the bank, on the order of the county treasurer, of all sums of money deposited with it by the county. The bank became insolvent and closed its doors when the county deposits amounted to $35,395.70. The present suit was brought in the district court of Sioux County, Nebraska, to recover from the surety the amount of the bond and a reasonable attorney's fee, under Neb. Comp. Stat. (1922) § 7811, and was removed to the United States district court for diversity of citizenship.

The authorized capital of the bank was $50,000, and the defense relied upon by the surety was a provision of Neb. Comp. Stat. (1922) § 6193, which forbade the deposit of county funds by county treasurers in excess of fifty per cent of the authorized capital of the depository. The district court gave judgment for the full amount of the bond and for an attorney's fee of $3,000. The Court of Appeals for the eighth circuit reversed the judgment, disallowing the attorney's fee and any recovery on the bond in excess of $25,000, which was one-half of the authorized capital of the bank. *National Surety Co.* v. *Lyons*, 16 Fed. (2d) 688. This Court granted certiorari. 274 U. S. 729.

The Court of Appeals took the view that the Nebraska statute, printed in the margin,[1] as construed by the Supreme Court of

[1]Neb. Comp. Stat. (1922) § 6193, ". . . The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the

Nebraska, operated to limit the liability on the statutory surety bond to one-half of the authorized capital of the depository. *Cole* v. *Myers*, 100 Neb. 480; *Blaco* v. *State*, 58 Neb. 557; *In re State Treasurer's Settlement*, 51 Neb. 116; *State ex rel. Davis* v. *People's State Bank of Anselmo*, 111 Neb. 126.

The correctness of this interpretation of the Nebraska decisions is questioned here, but all doubts on that point have been set at rest by a later decision of the state court. In *Scotts Bluff County* v. *First Nat. Bank*, 212 N. W. 617, decided since the entry of judgment below, the Supreme Court of Nebraska held that the statute does not have the effect asserted, and that within the amount of the bond a county may recover from the surety the full amount of the deposit even though it exceed fifty per cent of the authorized capital of the depository.

We accept this construction of the statute and accordingly set aside the conflicting interpretation of the court below, even though it antedated the determination by the state court. *Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458; *Bauserman* v. *Blunt*, 147 U. S. 647. If, as the state court held, the statute is to be construed as not affecting the obligation of the surety, we think it plain that the liability on the bond, *qua* contract, is not affected by the county treasurer's breach of duty. The bond contains no limitation of the amount which the treasurer may deposit. The district court was therefore right in allowing a recovery of the full amount of the bond.

In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that § 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As costs in the federal courts are regulated exclusively by R. S. §§ 823 and 824, the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. See *United States* v. *Sanborn*, 135 U. S. 271, 282; *The Baltimore*, 8 Wall. 377, 388, *et seq.*; compare *Ex parte Peterson*, 253 U. S. 300, 314-319.

Both in an earlier case, *Globe Indemnity Co.* v. *Sulpho-Saline Bath Co.*, 299 Fed. 219, certiorari denied 266 U. S. 606; see also

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bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half of the amount of the bond of such bank, and the amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent of the paid up capital stock of such bank. . . ."

Spring Garden Insurance Co. v. *Amusement Syndicate Co.*, 178 Fed. 519, and in a later case, *Business Men's Assurance Co.* v. *Campbell*, 18 Fed. (2d) 223, the same court applied the Nebraska statute allowing the recovery of attorneys' fees in suits upon insurance policies. When it was argued that no other costs can be taxed in a court of the United States than those authorized by federal statute, the Court of Appeals said in the latter case (p. 224) that the objection "applies only to ordinary costs, and not to allowances for attorneys' services provided by state statutes."

State statutes allowing the recovery of attorneys' fees in special classes of actions have been upheld as constitutional by this Court, *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 189 U. S. 301; *Missouri, Kansas & Texas Ry.* v. *Harris*, 234 U. S. 412; *Chicago & Northwestern Ry.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35; *Fidelity Mutual Life Ass'n* v. *Mettler*, 185 U. S. 308, and they have been given effect in suits brought in the federal courts. *Fidelity Mutual Life Ass'n* v. *Mettler*, *supra*; *Iowa Life Insurance Co.* v. *Lewis*, 187 U. S. 335; *Home Life Insurance Co.* v. *Fisher*, 188 U. S. 726; *Hartford Fire Insurance Co.* v. *Wilson & Toomer Fertilizer Co.*, 4 Fed. (2d) 835, certiorari denied 268 U. S. 704.

In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced, and for the liability thus assumed a remedy was available in the federal as well as in the state courts. *Fidelity Mutual Life Ass'n* v. *Mettler*, *supra*, at 326.

The present statute, printed in the margin[2], provides that in the cases specified the court "shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as a part of the costs." The direction that the added liability be included in the judgment as costs does no more in substance than the provision upheld and applied in the *Mettler* case, that the insurance company "shall be liable to pay . . .

[2]Neb. Comp. Stat. (1922) § 7811. "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

all reasonable attorney's fees" or the provision upheld and applied in *Home Life Insurance Co.* v. *Fisher, supra,* that the attorneys' fees should be added to the judgment.

Such doubt as there may be as to the meaning and effect of the statute arises from certain decisions of the Supreme Court of Nebraska enforcing it in suits upon insurance contracts entered into before its enactment, in which the statute, attacked as impairing the obligation of the contract, was characterized as "remedial" or as a "costs" statute. *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co.,* 98 Neb. 27; *id.,* 863; *Ward* v. *Bankers Life Co.,* 99 Neb. 812; *Reed* v. *American Bonding Co.,* 102 Neb. 113. In *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co., supra,* the Supreme Court of Nebraska said (p. 867):

"If the question that we are considering was now presented for the first time, we would hesitate to say that this statute does not create and add to the contract a legal liability which would not exist under the contract prior to the enactment of this statute. The fact that the attorney's fee is to be taxed as costs in the case is not of itself decisive of the question."

But the question before the Nebraska court in the cases cited was not that with which we are now concerned. Whether this liability for an attorney's fee, assumed by entering into an insurance contract after the enactment of the statute providing for the liability, may be enforced in the federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. §§ 823, 824. The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. §§ 823, 824. That the particular mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—is not available to the federal courts

under R. S. §§ 823, 824 does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment. R. S. § 914. Compare *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194; *Indianapolis & St. Louis R. R.* v. *Horst*, 93 U. S. 291; *Manitowoc Malting Co.* v. *Feuchtwanger*, 196 Fed. 506; *Boatmen's Bank* v. *Trower Bros. Co.*, 181 Fed. 804.

It is said that the fee customarily allowed in Nebraska is not less than 10% of the amount involved, *O'Shea* v. *North American Hotel Co.*, 111 Neb. 582; *Wirtele* v. *Grand Lodge*, 111 Neb. 302; *Central Nebraska Millwork Co.* v. *Olson & Johnson Co.*, 111 Neb. 396, and that as directed by the statute an additional fee should be allowed here for the appeal in the Court of Appeals and to this Court. The district court, in allowing $3,000 apparently assumed that the full amount of the bond, $30,000, was involved. In a technical sense this was true, since the defendant, by its pleading put in issue the right to recover the whole amount. But in point of substance the only defense was directed to the $5,000 by which the amount of the bond exceeded one-half the bank's authorized capital. For the purpose of fixing a reasonable sum, regard should be had for the amount substantially involved. For that reason we think that the fee to be allowed in all courts should not exceed $2,000. The judgment of the Circuit Court of Appeals will be reversed and the cause remanded with directions to reinstate so much of the district court's judgment as awarded to petitioner the amount of the bond with interest, aggregating $33,492.50; interest on that amount at the rate of 7% will be allowed from September 22, 1925, the date of the district court's judgment; and the sum of $2,000 without interest will be allowed as an attorney's fee.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.